

# ADMINISTRATIVE PROCEDURE

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HEARINGS  
BEFORE THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
SEVENTY-NINTH CONGRESS  
FIRST SESSION  
ON THE SUBJECT OF  
FEDERAL ADMINISTRATIVE PROCEDURE  
AND ON THE FOLLOWING BILLS  
H. R. 184, H. R. 339, H. R. 1117, H. R. 1203  
H. R. 1206, and H. R. 2602

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JUNE 21, 25, AND 26, 1945

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## ADMINISTRATIVE PROCEDURE

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THURSDAY, JUNE 21, 1945

HOUSE OF REPRESENTATIVE,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The committee met at 10 a. m., Hon. Hatton W. Sumners (chairman) presiding.

The CHAIRMAN. The committee will come to order at least for the purpose of straightening out in a preliminary way our procedure.

Mr. McFarland, I believe you are going to have some responsibility for the presentation in order of the views of yourself and your group who have had much responsibility and rendered much service in the drafting, for consideration of the committee, of the matters that are to be considered today.

Several bills have been introduced and are now pending in this committee dealing with this important subject matter. As I indicated to you a moment ago and will state now, if we get the discussion in some order dealing with this subject matter, it will materially shorten the hearing. I suppose you want to make some introductory statement about the need, in the judgment of its proponents, of this proposed legislation. It seems to me it would then fall under some general subheadings.

First, you would deal, I suppose, with the formation of the directives, giving us the benefit of your judgment as to how those directives are to be formulated and what opportunity the people who are to be affected by them have of presenting their views with regard to what those directives should be.

Then it seems to me perhaps the next thing of importance would be a suggestion as to what agency and how it should be created for hearing the matters in dispute; then the general machinery on up through the structure of the Department, the right of appeal to the court, what questions would be subject to review in the court; whether or not there would be any de novo trial in any circumstances.

I hope you will understand the indications of the chairman do not convey any certainty of judgment on his part. He has certainly no disposition to limit or even direct the proceedings. There are going to be some other members of the committee here soon. Unfortunately, this committee, as is true of many of the committees of the House, is considerably disorganized now by reason of the draft which has been made upon its membership to constitute other committees dealing with specific matters. I think, however, we have the real brains of the committee here now and it would save some time if you proceed.

All right, Mr. McFarland.

Mr. McFARLAND. Mr. Chairman, Mr. Simmons will introduce the subject for our group; then will be followed by Mr. Miller, and then by myself, if necessary.

#### STATEMENT OF DAVID A. SIMMONS, PRESIDENT, AMERICAN BAR ASSOCIATION

Mr. SIMMONS. My name is David A. Simmons, from Houston, Tex.

Mr. Chairman and gentlemen of the committee, I appear here as president of the American Bar Association. For the record, I might say that for 5 years before that I was president of the American Judicature Society, a group of 6,500 lawyers and judges throughout the country who dedicate their spare time to the improvement in the judicial administrative process. Before that I was president of the Texas Bar Association, of the Houston bar and, in my private practice, am a member of a small law firm in a middle-sized city. I might perhaps call myself a country lawyer. I find that is a little unusual in the membership of the American Bar Association; but at least it is current in Government practice.

I have served as first assistant attorney general of Texas; assistant United States district attorney under the Wilson administration in south Texas, and have represented a number of administrative bodies and boards in Texas and in my community.

I have a short statement introductory of this subject and in order, lawyerlike, that I may not get off on too many other subjects, having just come from 7 weeks at San Francisco as a consultant of the State Department, where I helped to "revise and reorganize the world," with your permission I will restrict myself to this short statement.

It is not my purpose to review in detail the several proposals now before you nor to dwell upon the objectives of particular provisions. Mr. Clarence A. Miller—who is a former president of the Interstate Commerce Commission Practitioners, former chairman of the Section on Administrative Law of the District of Columbia Bar Association, and presently chairman of the American Bar Association's Committee on Administrative Law for the District of Columbia—will present to you the history of the proposals and the basis for the provisions therein. I think I can say, however, that the measures which are now before you are parts of an unbroken chain of development in which a thoroughly democratic process is evident. Every branch of the legal profession has participated. Lawyers, judges, and administrators have been members of the committees which have made valuable contributions and constructive suggestions.

These bills—and particularly H. R. 1203 with some modifications which I shall presently mention—mark the culmination of more than 10 years of consideration, studies, reports, and recommendations by various public and private bodies. Beginning in 1933 a committee of the American Bar Association proposed the creation of a special administrative court. In 1937 the President of the United States recommended a reorganization of the Federal executive branch upon the ground that the present form of administrative tribunal, which performs "administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution." These proposals were succeeded

by a proposed administrative procedure act known generally as the Walter-Logan bill. The latter was passed by Congress, but vetoed by the President to await the conclusion of studies and the report of a committee—composed of Government officers, judges, and lawyers—appointed to study the subject. The so-called Attorney General's Committee on Administrative Procedure made its report early in 1941. Thereafter a subcommittee of the Senate Judiciary Committee held extensive hearings, but suspended consideration with the imminence of war. During the past 2 years there has been a marked revival of interest which has been directed toward two related objectives:

I wish to interpolate here that in the last year I have, as president of the American Bar Association, had to go in every corner of the country and I find everywhere the greatest interest, Mr. Chairman and gentlemen, in these bills and in this subject matter. I think I can say without fear of contradiction and without being an advocate about it but merely a spokesman for the bar that there is very great interest and very great hope that something will be done which is constructive, and at no long-distant date, on this subject. I find that sentiment in the smallest hamlets. I believe the feeling is more urgent among the lawyers in the smaller States and country districts among the people generally. I do not limit it to lawyers, although I stand here only as spokesman for the lawyers.

As I say, during the past 2 years there has been a marked revival of interest which has been directed toward two related objectives:

First, the adoption of a general administrative procedure statute. Secondly, the more specific definition of administrative powers as individual pieces of legislation involving administrative agencies come before Congress for adoption, revision, or renewal.

Practically all of these bills have three basic features, although they differ in language and detail. Those features are—

1. Provision for publicity of administrative law and procedure. I need not tell this committee of the confusion in that field.

2. A statement of the minimum procedural requirements of the two basic types of administrative operations—that is, (a) the making of general regulations, and (b) the adjudication of particular cases.

3. A simplified statement of the right, procedure, and scope of judicial review.

The purpose of these is threefold: (1) to simplify the subject; (2) to state minimum standards; and (3) to notify the citizen so that the mystery may be removed from the American system so far as administrative agencies are concerned.

Since no one desires to injure the legitimate operations of government, there is no reason why the provisions of any bill adopted should not bring general acceptance and approval. As evidence of this fact, the Senate Judiciary Committee has recently issued a print in which certain suggestions are made as the result of extended conferences between the representatives of the Attorney General and other parties. I understand that an agent of the Attorney General is or will be here to discuss the matter. Mr. Carl McFarland, who was formerly an Assistant Attorney General of the United States, a member of the Attorney General's Committee on Administrative Pro-

cedure, and is now the chairman of the American Bar Association's administrative law activities, will present for you a discussion of the suggested draft developed in cooperation with the representatives of the Attorney General at the suggestion of the chairman of the Senate Judiciary Committee as well as the way in which the detailed provisions of the proposed bills reflect the basic recommendations of the Attorney General's Committee on Administrative Procedure.

The one matter upon which no printed document reveals common agreement is the appointment of hearing officers for administrative cases. In that respect three different proposals have been made, as follows:

First is the suggestion that they be appointed and removed within the usual framework of the public service, which means the civil-service system.

Second is the proposal for an office of administrative procedure, headed by Presidential appointees, to make or approve appointments and removals of examiners as well as to exercise general supervisory and research powers.

Third is a suggestion that the Judicial Conference appoint an officer to appoint and remove examiners. This suggestion is attractive, but may present constitutional problems as to the appointing power. Perhaps a solution would be for the Presidential appointment of such an officer or officers, with provision for the Judicial Conference to make recommendations to the President.

Now we have a suggestion that we want to leave for your consideration as to, perhaps, a joint legislative committee.

Legislation of the character we are discussing is designed, as I have said, merely to simplify the law, lay down minimum standards, and notify the citizen of his procedural rights. It provides no code of procedure and leaves many vital matters untouched. But, more important, it does not touch at all the more serious problem of making the substantive powers of administrative officers more specific. Indeed, there is so much that needs to be done in this field that any statute such as is here pending is but a start.

Some means must be found for Congress itself to exercise continuing supervision and improvement in the matter of administrative justice. To that end, it is suggested that there ought to be provided—preferably in any bill which this committee may report and as an addition to the subjects now proposed to be contained in it—a joint committee on administrative law and procedure. That committee should have an adequate staff. It should operate like the Joint Committee on Taxation. It should engage in the drafting of legislation conferring administrative powers. It should conduct investigations. It should make recommendations for further procedural legislation.

I wish to do no more at this time than to leave this thought with you. We need an administrative procedure act, but it is only a beginning. In order that it may not be a stopping point, our suggestion is that means be provided in any bill reported whereby continuing improvements may be made.

Now, to that written statement, with your permission, I will add just one thought. I have gone about this country this year, as president of the American Bar Association and as an ordinary lawyer from the Southwest, talking to people in every walk of life. I find there is

great interest in the matter of governmental reorganization, in which this is merely one part, and in the years that I have given of my life to talking with people of America on these subjects I find that next to the war itself at the moment this is the most interesting subject to them of a political nature. And I have had occasion to make several speeches. The distinguished chairman and I spoke over the same national radio program in New York last winter on a subject related to this and I had correspondence from all over the country. May I suggest that we give, as citizens and as members of the legislative branch, a great deal more thought to the subject of the three divisions of government.

I am not going to make a speech. My 1-hour speech is printed in the American Bar Association Journal of February. It has received some favorable comment in every State of the Union and has been reprinted and scattered broadcast. The basic thought that impressed people was this, that the Congress is the legislative branch of our Government—it is the one elected by the people—it is the one the people must rely on and we do not any longer want Congress to set up bureaus and commissions and say to them: "We recognize there is a great problem in this particular field. We have not the time to solve this problem as we did in the early days of this Republic; we are going merely to set up a commission of some kind and give you full powers, and you endeavor to solve that problem." The people of America, insofar as I have been able to determine, desire that the Congress set up its own agencies. The appropriation for Congress is a mere pittance. I have gone about this country pointing out that your appropriation for the current year was only \$13,000,000 for salaries and expenses—10 cents a head for all the people of America. You did not know, I suppose, that you had a spokesman in the president of the American Bar Association this year urging and telling the people that Congress must be given more funds; yes, salary, too—I am for that. But you have to set up an establishment here sufficient to run a nation of 136,000,000 people and if it costs the people of America \$1 a head to run the congressional establishment, Mr. Chairman and gentlemen, the people are willing to have it done.

When I read that you have an Office of Legislative Counsel with an appropriation of \$82,000 to help you draft your bills, I personally feel you should have a staff adequate and equal to that of any department of the Government. I say that is ridiculous, because this is the department of Government that represents the people of America.

You see, it would be easy to get me started on that, and I will merely stop the statement where I began. In this paper I have submitted that this is a step in the right direction.

The CHAIRMAN. Before you take your seat, I want personally to express my appreciation to you as president of the American Bar Association this year, and I see another very prominent man over there who has been doing the same thing; that is, while you were making these speeches, you also have been telling the people they have to take back in the States and small communities some of these powers concentrated here so that we can operate this country under laws passed by Congress, and directives.

Mr. SIMMONS. That is right.

The CHAIRMAN. I have been saying for a good while you are either going to have to do that or you are going to have to go ahead and establish these great organizations of considerable size around Members of Congress and wind up with 500 or 600 other bureaus, and the Congressman will be in the center of it and he won't know much about what the folks are doing under it.

Mr. SIMMONS. I agree with you and will be glad at some time to discuss that with you over a national radio chain.

**STATEMENT OF C. A. MILLER, WASHINGTON, D. C., CHAIRMAN,  
AMERICAN BAR ASSOCIATION COMMITTEE ON ADMINISTRATIVE  
LAW FOR THE DISTRICT OF COLUMBIA**

Mr. MILLER. Mr. Chairman and gentlemen of the committee, as Mr. McFarland said, I am going to take up where the president of the American Bar Association left off.

The CHAIRMAN. I believe it would be a good idea for you to identify yourself, first.

Mr. MILLER. My name is C. A. Miller; my office is 1120 Tower Building, Washington, D. C. By way of identification and some qualification, perhaps I should say at the present time I am vice president and general counsel of the American Short Line Railroad Association. I mean by that that is the source from which I obtain my compensation.

I am here as the chairman of the American Bar Association committee on administrative law for the District of Columbia.

I have been, as the president of the American Bar Association said, a past president or am a past president of the Association of Interstate Commerce Commission Practitioners. I was a member of the committee that cooperated with the Interstate Commerce Commission's committee in revising the general rules of practice of the Interstate Commerce Commission in 1941 and 1942; I was also a member of the committee that revised the rules of practice of the Public Utilities Commission of the District of Columbia which were adopted in 1942.

So far as my experience is concerned, I should say, in the field of administrative law, it began about 25 years ago when I became a member of Mr. Beaman's staff in the office of what now is the Legislative Counsel Service. Mr. Beaman and Mr. Law, with whom most of you gentlemen are acquainted, were my original preceptors and instructors in the field of administrative law. Since that time, however, my experience has been mostly as a practitioner before the administrative agencies of the Government specializing in particular before the Interstate Commerce Commission.

In making this statement, I think I should say to you gentlemen I appear here solely as the representative of the American Bar Association, although our own Short Line Association has endorsed and is in favor of an administrative law bill.

Your committee has before it, Mr. Chairman, six bills; namely, H. R. 184, the so-called Celler bill; H. R. 339 and H. R. 1117, identical bills, which we style the Smith-Cravens bill; H. R. 1203, the Sumners bill, which is generally known throughout the country as the McCarran-Sumners bill; H. R. 1206, the Walter bill, and H. R. 2602, the Gwynne bill.

I assume, Mr. Chairman, it is the purpose and intent of the chairman to have these bills made a part of the record of this hearing?

The CHAIRMAN. I do not know as to whether we will make them a part of the record or not, but I believe it would be helpful if you would discuss the general subject matter as distinguished, at this time, from discussing the provisions of the particular bills. (The bills appear in the appendix.)

Mr. MILLER. That is what I propose to do. I may say to you, Mr. Chairman, in such preparation as we could make for this hearing, our idea was it should be as flexible as it could be made so as to meet the desires of the committee to the extent possible; at the same time to be as helpful to the committee as possible without being too lengthy in our presentation. For that reason, I have had prepared and there is before each of you gentlemen a mimeographed document captioned "Summary of salient features of administrative procedure bills pending before the Committee on the Judiciary, House of Representatives, United States." In the summary statement I take up each of the bills in their numerical order and very briefly summarize what we consider to be the salient features of those bills.

A very cursory examination of that statement will indicate to you gentlemen that, by and large, the bills cover the same general territory. There are differences in the details of them and in the approach, but I believe no good purpose would be served by my going into any elaborate description of the salient features of these various bills at this time.

The CHAIRMAN. I think you are right.

Mr. MILLER. I think the document presented to you will serve the purpose of shortening the hearing as much as possible. The chairman can, of course, have that statement incorporated in the record if he wishes; or, if not, as may suit the convenience of the committee.

The CHAIRMAN. We will be very glad to incorporate that in the record, Mr. Miller.

(The matter above referred to is as follows:)

**SUMMARY STATEMENT OF SALIENT FEATURES OF ADMINISTRATIVE PROCEDURE BILLS  
PENDING BEFORE COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES,  
UNITED STATES, JUNE 21, 1945**

(H. R. 184, Celler bill; H. R. 339 and H. R. 1117, Smith-Cravens bills; H. R. 1203, Sumners bill; H. R. 1206, Walter bill; H. R. 2602, Gwynne bill)

**H. R. 184—CELLER BILL**

**I. DECLARATION OF GENERAL POLICY**

1. All administrative authority should be effected by established procedures designed to assure adequate protection of private interests and to effectuate declared policies of Congress.
2. All procedures should be made known to all interested persons.
3. Adjudication should include due notice, opportunity to be heard, and prompt decision.

**II. DELEGATION OF AUTHORITY**

Provision is made for delegation of authority to subordinates.

**III. OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE**

1. Director of Federal Administrative Procedure, to be appointed by President, by and with advice and consent of Senate.

**2. Office of Federal Administrative Procedure:**

- (a) Director.
- (b) Justice of the United States Court of Appeals, District of Columbia.
- (c) Director of Administrative Office of United States Courts.
- (d) Advisory Committees.

**3. Duties of Director:**

- (a) Investigate agency practices and procedures.
- (b) Recommend uniform procedures.
- (c) Investigate complaints regarding procedures.
- (d) Examine practices respecting publicity.
- (e) Investigate admissions to practice.
- (f) Act, with members of Office, respecting appointment and removal of hearing commissioners.
- (g) Submit annual report.

**IV. RULES AND RULE MAKING**

- 1. Publication of internal organization of agencies required.
- 2. Publication of policies, interpretations, and rules required.
- 3. Provision for receipt of suggestions for rules required.
- 4. Retroactivity of effect of rules prohibited.
- 5. Provision is made for requesting amendments of rules.

**V. ADJUDICATION**

(Applicable where hearing accorded by statute)

**1. Hearing commissioners:**

- (a) Nominated by agency and appointed by Director OFAP.
- (b) Term, 7 years.
- (c) Removable, for cause after hearing.
- (d) Powers and duties are prescribed.

**2. Hearing of cases:**

- (a) Presiding officer, a hearing commissioner.
- (b) Powers and duties of hearing commissioner prescribed.
- (c) Provision made for cases of disobedience of lawful orders.
- (d) Prehearing conferences authorized.
- (e) Provision made for briefs, argument, requested findings, etc.
- (f) Provision is made for disqualification of hearing commissioner.

**3. Decision of cases:**

- (a) Decision of hearing commissioner final unless appealed to agency.
- (b) Provision is made for reopening of decisions not appealed.
- (c) Provision is made for appeal of hearing commissioner's decision.

**VI. APPEAL TO COURTS**

- 1. Content of record on appeal to courts is prescribed.
- 2. Mistake of remedy is not to preclude judicial review.

**VII. DECLARATORY RULINGS**

Provision is made for declaratory rulings.

**H. R. 339 AND H. R. 1117—SMITH-CRAVENS BILL**

(Military, naval, and diplomatic functions excepted from all requi

**I. RULES**

Every agency required to publish—

- (a) Descriptions of internal and field organization.
- (b) Method of channelization of functions.
- (c) Substantive regulations.

**II. RULINGS AND ORDERS**

Every agency required to publish—or make available—all general rulings, opinions, orders, etc.



**III. RELEASES**

Required to be filed with Division of Federal Register and be made available to public.

**IV. ENFORCEMENT**

1. No person to be prejudiced by failure to avail himself of anything not published as required.
2. Comptroller General to disallow expenditures of nonconforming agencies.

**V. RULE MAKING**

1. Notice of proposed rule making required.
2. Interested parties accorded opportunity to participate in formulation of rules.
3. Right to petition for change of rules is accorded.

**VI. ADJUDICATION**

(Where law now accords hearing)

1. Adequate notice of proceeding is required.
2. Adequate opportunity for full hearing prescribed.
3. Declaratory orders are provided for.

**VII. APPEARANCES**

1. Right of appearance in person or by counsel provided.
2. Right to advice by, and accompaniment of, counsel is provided.

**VIII. INVESTIGATIONS**

1. Limited to those authorized by law, within agency jurisdiction, and substantially necessary.
2. Required to be conducted so as not to disturb rights of personal privacy and to interfere as little as possible with private occupation or enterprise.

**IX. SUBPENAS**

1. Made available to private parties.
2. Provision is made for determining validity.

**X. DENIALS**

Prompt notice—and grounds therefore—required.

**XI. RETROACTIVITY**

Rules or orders not to become effective prior to publication or service, unless authorized by law.

**XII. RECORDS**

Matters of official record made available to interested parties.

**XIII. HEARINGS**

1. Presiding officers—Commissioners or Deputy Commissioners.  
Three Commissioners appointed by President, with advice and consent of Senate, for terms of 12 years.  
Deputy Commissioners appointed by Commissioners.
2. Powers of hearing officers prescribed in detail.
3. Rules of evidence are prescribed.
4. Record—consist prescribed.

**XIV. DECISIONS**

1. Opportunity for briefs, proposed findings, conclusions, and oral argument prescribed.
2. Order, award, etc., required to be made by hearing officer.
3. Appeal from decision of hearing officer to agency provided.
4. Decision required to be based upon the record.
5. Findings and determinations required to be in writing and served upon all parties.

**XV. PENALTIES AND BENEFITS**

1. Imposition of sanctions is strictly limited.
2. Licensing requirements are specifically safeguarded.

**XVI. JUDICIAL REVIEW**

1. Right of judicial review is accorded.
2. Form of action is prescribed.
3. Interim relief is provided.
4. Scope of review is prescribed.

**XVII. SEPARATION OF FUNCTIONS**

Complete separation of investigative and prosecuting functions from those of adjudication and rule making is required.

**H. R. 1203—SUMNERS BILL****I. PRINCIPAL FEATURES**

1. Publicity of administrative law and procedure.
2. Minimum procedural requirements for rule making and adjudication.
3. Specification and simplification of judicial review.
4. Statement of common incidental procedural rights pertaining to any kind of Executive authority.
5. Limitations upon types of penalties imposable by administrative agencies.
6. Bill applies to functions rather than agencies.
7. War agencies are exempt—except for publication of rules—also military, naval, or diplomatic functions requiring secrecy in the public interest.

**II. PUBLICITY OF ADMINISTRATIVE LAW AND PROCEDURE**

1. Agencies are required to publish—
  - (a) Descriptions of internal and field organizations.
  - (b) Statement of methods for channeling and determining matters handled.
  - (c) Rulings and orders.
  - (d) Final opinions.

**III. RULE MAKING**

1. Requires notice of proposed substantive rules and opportunity to be heard.
2. Requires publication of reasons and conclusions for rejection of proposed rules.
3. Affords opportunity for petition for issuance of rules, or changes therein.

**IV. ADJUDICATION**

(Where statute requires opportunity for hearing)

1. Requires adequate notice.
2. Requires opportunity for settlement by agreement.
3. Prohibits investigative or prosecuting employees from participating in decision or recommended decision.
4. Provides for declaratory orders.
5. Accords right of appearance—in person or by counsel.

## V. INVESTIGATIONS

1. Limited to those authorized by law, and within jurisdiction of agency, and in interest of law enforcement.
2. Protects right of personal privilege or privacy.

## VI. SUBPENAS

1. Requires subpoenas authorized by law to be issued to any party.
2. Accords court right to determine relevancy and jurisdiction, where validity of subpoena is questioned.

## VII. DENIALS

1. Prompt notice is required where application, petition, or other request is denied in whole or in part.

## VIII. PUBLIC RECORDS

1. Matters of official record are made available to interested parties—with certain exceptions.

## IX. HEARINGS

(Applicable to rule making and required hearings)

1. Specification of presiding official is made.
2. Impartiality is required.
3. Provides for disqualification of hearing officer.

## X. EXAMINERS

1. Requires each agency to appoint examiners, subject to civil-service rules.
2. Provides for survey of examiners' salaries by Civil Service Commission.
3. Provides for lend-lease of examiners by agencies.

## XI. HEARING PROCEDURE

1. Specifies burden of proceeding.
2. Provides presumption of legitimacy of conduct or action.
3. Gives right of cross-examination.
4. Prescribes admissibility of evidence—and action thereon.
5. Specifies consist of record.
6. Limits taking of official notice.

## XII. DECISIONS

1. Provides for initial or recommended decisions.
2. Provides for final decisions.
3. Requires due process—and specifies it—before any decision is made.
4. Specifies content of decisions and recommended decisions.

## XIII. SANCTIONS

1. Specifies limitations on sanctions.
2. Specifies conditions under which licenses shall be deemed granted.
3. Limits withdrawals, suspensions, revocations, and annulments of licenses.
4. Protects actions while license applications are pending.

## XIV. PUBLICITY

1. Prohibits agencies from issuing publicity reflecting adversely upon any party or enterprise.

## XV. JUDICIAL REVIEW

1. Does not give right of judicial review where none now exists.
2. Specifies form and venue of action.
3. Defines reviewable acts.
4. Provides interim relief.
5. Specifies scope of review.

## ADMINISTRATIVE PROCEDURE

## H. R. 1206—WALTER BILL

## I. DECLARATION OF GENERAL POLICY

1. Declares that powers of Government—exercised through administrative agencies—

(a) Shall be conducted according to established procedures—

1. Assuring adequate protection.
2. Assuring impartial conferring of benefits.

## II. DELEGATION OF AUTHORITY

1. Provides for delegation of agency authority to subordinates, with agency responsibility for acts done, etc.

2. Requires publication of rules relating to delegations of authority.

## III. APPEARANCES

1. Provides for appearances in person or authorized representatives.

2. Accords right of advice of counsel to persons summoned in any agency proceeding.

## IV. ATTORNEYS AND AGENTS

1. Provides for suspensions or disbarments of practitioners.

2. Requirements for admission to practice, and maintenance of formal registers of attorneys or agents to be omitted when practicable.

3. Office of Administrative Procedure authorized to establish and maintain central method for registration or admission of attorneys and agents.

4. Except in Patent Office, attorneys in good standing in highest court of State or Territory, or in any Federal court, are eligible to practice.

5. Appearance by former employees of agency is limited.

6. Nonlawyers admissible under reasonable rules and regulations of agency.

## V. INVESTIGATIONS

1. Investigations required to be conducted with least possible disruption of personal privacy, or private occupation or enterprise.

2. Reports required to be simplified as much as possible.

3. Specific limitations and admonitions are provided.

## VI. SUBPENAS

1. To be issued only upon request and reasonable showing as to necessity, scope, etc.

2. To be issued to private parties as freely as to agencies.

## VII. PUBLICITY

1. Matters of record (with certain exceptions) are made available to all interested persons.

2. Limits publicity of proceedings by agencies.

## VIII. OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

1. Director (learned in the law, or qualified by experience) appointed by President with advice and consent of Senate for term of 7 years.

2. Governed by Board—

(a) The Director.

(b) An Associate Justice of United States Court of Appeals for District of Columbia.

(c) Director of Administrative Office of United States Courts.

3. Duties are specified in detail.

## IX. EFFECT AND ENFORCEMENT

1. Act in general to serve as guides and limitations.

2. Violation of mandatory provisions made subject to disciplinary action.

## X. SUSPENSION OF PROVISIONS

1. Provisions of the act may be suspended by President—upon recommendation of an agency and OFAP.
2. Provision is made for termination of suspension by Congress.

## XI. ADMINISTRATIVE RULES AND REGULATIONS

1. Declared policy—agencies shall issue rules, regulations, etc., as to organization and procedures.
2. Military, naval, diplomatic, and certain other functions excluded.
3. Standards for regulations are prescribed.
4. Receipt and consideration of suggestions for rules are provided for.
5. Notice of proposed rule-making is provided for.
6. Public rule-making procedures are prescribed.
7. Provision is made for judicial review of rules.
8. Declaratory judgments are provided for.
9. Scope of judicial review is prescribed.
10. Rulings in specific cases are not to serve as general rules.
11. Rules promulgated are to be transmitted to Congress annually.

## XII. ADMINISTRATIVE ADJUDICATIONS

1. Due process is specifically prescribed.
2. Exception is made for military and diplomatic functions, and determinations triable de novo, and certain other activities.
3. Expedition of determinations is provided for.
4. Informal dispositions of controversies are provided for.
5. Declaratory rulings are prescribed, upon petition.
6. Requirements of formal procedures are specified in detail.
7. Complete segregation of prosecuting and adjudicatory functions is required.
8. Hearing commissioners are provided for, to be nominated by agency and appointed by OFAP.
9. Provision is made for disqualifying presiding officers.
10. Powers and duties of presiding officers are prescribed.
11. Prehearing conferences are provided for.
12. Rules of evidence are specified.
13. Provision is made for cross-examination.
14. Conditions of taking of official notice are prescribed.
15. Post hearing procedure—proposed reports, etc.—is detailed.
16. Procedure for reaching final determinations is detailed.
17. Rehearing, reopening, and reconsideration of decisions is provided for.

## XIII. JUDICIAL REVIEW

Detailed provision is made for judicial review.

## H. R. 2602—GWYNNE BILL

## I. OBJECTS

1. Improve relations between private citizens and governmental authority.
2. Facilitate administration of justice.
3. Protect civil rights.
4. Preserve constitutional form of government.

## II. PUBLIC INFORMATION

1. Publication of rules, including organization, in Federal Register, is required.
2. Agency rulings and orders are made available to public.
3. Releases are required to be filed with Division of Federal Register, and made available to public inspection.

## III. PENALTIES AND BENEFITS

1. Imposition of sanctions is restricted.
2. Licensing requirements are restricted.
3. Exercise of investigative powers is limited.
4. Subpenas are made available to private parties.
5. Right of appearance in person or by counsel is prescribed.

## IV. JUDICIAL REVIEW

1. Right of judicial review is prescribed.
2. Powers of courts on judicial review are specified.
3. Interim relief is provided.
4. Scope of judicial review is prescribed.

## V. SEPARATION OF FUNCTIONS

Complete separation of prosecuting and adjudicatory functions is provided.

## VI. RULE MAKING

1. Public notice is required.
2. Procedures are prescribed.
3. Provision is made for petitions for amendments, etc.

## VII. ADJUDICATION

(Where hearing is required by statute)

1. Adequate notice is required.
2. Fair procedure is required.
3. Declaratory rulings are provided.
4. Hearings—
  - (a) By ultimate authority, or subordinate hearing officers.
  - (b) Evidence required to be in record.
  - (c) General rules of evidence are prescribed.
  - (d) Content of record is prescribed.
5. Decisions—
  - (a) Intermediate reports are provided.
  - (b) Briefs, argument, exceptions, etc., are provided.
  - (c) Decision based on record is required.
  - (d) Findings and determinations are required to be in writing, accompanied by reasons therefor.

Mr. MILLER. I have also prepared and had placed before your committee a chart which looks very much like a genealogical chart, and I would like to call your attention to that chart very briefly. It is headed at the top "Administrative law bills" and is a chart which shows all of the bills introduced in the Congress from the first bill on this general subject, back in the Seventy-third Congress, first session, which you will note was S. 1835 and was introduced by the great Senator Norris, "father of administrative procedure" as he is now called.

Then there was a succession of bills in the Congress down to and including the bill in the Seventy-sixth Congress known as the Logan-Wheeler bill, which is on that chart. In that column the committee will note that the thinking was on the basis of an administrative court. Then, during the Seventy-sixth Congress, S. 915 and H. R. 4236, also known as the Celler bill, changed that idea, got away from the idea

of an administrative court, so to speak, and went over to the subject of administrative procedure.

Mr. WALTER. I think that perhaps is due to the fact this committee in discussing generally the proposition decided we did not want any special courts.

Mr. MILLER. That is my recollection of about what happened. I think the folks who were considering that ultimately reached the conclusion it was not a workable idea.

My first purpose in presenting this chart to your committee is to show the change in the thinking on the subject; but another major purpose is to show the sequence of those bills and how they have developed. So you will find at the appropriate place I am showing where the Attorney General's Committee on Administrative Procedure intervened and I am also showing where the report on administrative management in the executive branch of the Government intervened in 1937.

That chart, Mr. Chairman, if you think it wise and worth while, may be incorporated in the record so far as I am concerned.

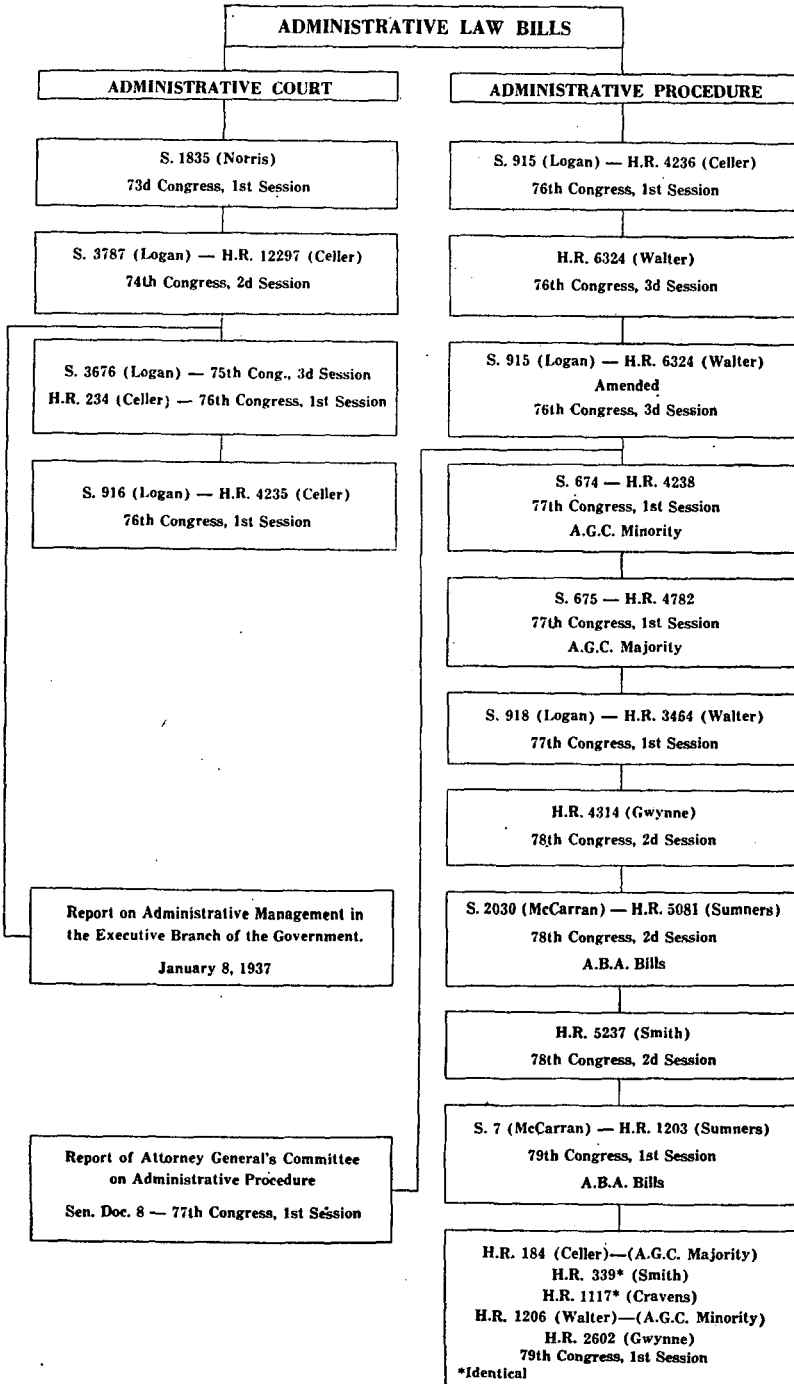
The CHAIRMAN. I think it should be incorporated.

Mr. MILLER. I have also prepared and am going to present to you another mimeographed statement which is entitled "History of McCarran-Sumners bills, S. 7 and H. R. 1203, with special reference to the American Bar Association." I do not intend either to read that statement in detail or discuss it in detail, because it was mimeographed and presented to you in order to avoid that very thing. I want to say to the committee, however, that this was prepared for your possible benefit to show you, first, the exhaustive consideration which has been given to this subject of reform of administrative procedure so far as the American Bar Association is concerned and so far as the congressional bills are concerned. You will find that this statement very largely coincides with the genealogical or diagrammatic chart which has been presented to you. That statement shows in detail—and all based upon matters of historical and documentary record—that this subject has been receiving consideration and serious consideration of the American Bar Association for a period of 12 or more years—at least 12 years. That statement will show to you, also, Mr. Chairman and gentlemen of the committee, that the consideration by the American Bar Association has followed pretty generally what we call today the democratic process.

As the president of the American Bar Association told you, this has not been the subject of consideration of a small group of people, but it has been receiving consideration of a large group of people within and without the American Bar Association, and every effort has been made to give the subject a thorough study. Whether or not sound results have been reached as a result of that study, of course, is a matter of opinion that I will not debate at this time, to say the least.

Here again, Mr. Chairman, I do not believe it is desirable that this statement be read in detail. I think, however, it might be well for the record to have it included at this point as a part of my statement,

(The matter above referred to is as follows:)





so that the historical background will be as complete as it is possible for me to make it.

The CHAIRMAN. That will be incorporated at this point.  
(The matter above referred to is as follows:)

**HISTORY OF MCCARRAN-SUMNERS BILL (S. 7 AND H. R. 1203, 79TH CONG., 1ST SESS.)  
TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE  
PROCEDURE WITH SPECIAL REFERENCE TO AMERICAN BAR ASSOCIATION**

(Prepared by C. A. Miller, Washington, D. C., January 31, 1945)

The McCarran-Sumners bill is the product of long study of administrative agencies, which have been defined as "something that looks like a court and acts like a court but somehow escapes being classified as a court whenever you attempt to impose any limitation on its power" (58 A. B. A. Rept. 197 (1933)). The subject of administrative law necessarily had to be studied along with the subject of administrative agencies. It has been said that administrative law "results from the reposing of what are essentially legislative or judicial functions (or both) in an official or board, sometimes belonging to the executive branch of the Government and sometimes independent" (53 A. B. A. Rept. 202 (1933)).

Genealogically speaking, the McCarran-Sumners bill can trace its ancestry back to the time when Senator Norris, of Nebraska, introduced S. 1835 in the first session of the Seventy-third Congress. This was a bill to establish a United States Court of Administrative Justice, which would have been a consolidation of the Court of Claims and the Court of Customs and Patent Appeals, with 5 additional judges, so that it would have been composed of 15 judges. It was proposed to transfer to this court the adjudications by the courts of the District of Columbia in mandamus and injunction proceedings against Federal officials, the review of decisions of the United States Board of Tax Appeals, and the jurisdiction of the United States district courts over claims against the United States and against collectors of internal revenue. This was the first bill introduced in Congress looking to the improvement of administrative justice. No action was taken on this bill.

At the meeting of the executive committee of the American Bar Association, in May 1933 a special committee on administrative law was created (58 A. B. A. Rept. 197 (1933)). That committee submitted its first report at the annual convention of the American Bar Association at Grand Rapids (58 A. B. A. Rept. 407 (1933)). The chairman of the committee stated that:

"The committee is not prepared to make a definite proposal \* \* \*. I incline toward the view that the ideal solution lies in the direction of a Federal Administrative Court, with appropriate branches so as to take over or review the judicial functions of the multitudinous Federal administrative tribunals" (58 A. B. A. Rept. 203 (1933)).

The special committee on administrative law submitted a report to the annual convention of the American Bar Association in Milwaukee in 1934 (59 A. B. A. Rept. 539-564 (1934)). The special committee was continued (59 A. B. A. Rept. 148 (1934)). The following resolution of the committee was adopted:

"That, subject to the approval of the executive committee, the association authorizes the special committee on administrative law to confer with the appropriate Government officials and to appear before the appropriate committees of Congress and to draft and urge the enactment of legislation in furtherance of the special committee's conclusions" (59 A. B. A. Rept. 152 (1934)).

The executive committee of the American Bar Association, at its meeting in January 1935, authorized the special committee on administrative law to draft a detailed bill giving expression to the committee's proposal for an Administrative Court. No bill was presented at the annual convention of the American Bar Association in Los Angeles, in 1935, for reasons explained at that convention (60 A. B. A. Rept. 136-143 (1935)).

S. 3787 and H. R. 12297 were introduced in the second session of the Seventy-fourth Congress by Senator Logan and Representative Celler. These were identical bills providing for the establishment of a Federal Administrative Court.

The special committee on administrative law submitted a report to the executive committee of the American Bar Association at its meeting in May 1936, detailing features of an Administrative Court bill. The executive committee approved a resolution to be submitted at the annual convention of the American Bar Association in Boston that year.

At the annual convention in Boston, in 1936, the special committee on administrative law submitted a report summarizing the provisions of the Logan-Celler bill, and recommended the adoption of a resolution approving in principle the establishment of a Federal Administrative Court, but without approving or disapproving any then pending bill (61 A. B. A. Rept. 720-794 (1936)). The subject of the composition, scope, and jurisdiction of the court was re-referred to the committee for further study and consideration, with directions to report at the next annual convention (61 A. B. A. Rept. 235 (1936)).

The Report on Administrative Management in the Executive Branch of the Government of the United States, submitted January 8, 1937, by the President's Committee on Administrative Management, through Louis Brownlow, Chairman, Charles Merriam and Luther Guelick, and the accompanying study, *The Problem of the Independent Regulatory Commission*, by Robert E. Cushman, contained recommendations very closely parallel to one of the two alternative plans presented to the American Bar Association at its annual convention in Milwaukee in 1934 (59 A. B. A. Rept. 539-546 (1934)). These alternatives, each designed to segregate judicial functions so far as practicable, were (1) a Federal Administrative Court or (2) an appropriate number of independent tribunals having judicial functions only and analogous to the United States Board of Tax Appeals.

In its report submitted to the American Bar Association at its annual convention in Kansas City in 1937, the special committee on administrative law stated that it had concluded to drop any attempt to create an Administrative Court or to consolidate existing legislative courts, and submitted, in lieu thereof, a proposal similar in principle to S. 916 and H. R. 4235, introduced in the first session of the Seventy-sixth Congress by Senator Logan and Congressman Celler, respectively. These bills, however, were not American Bar Association bills, and did not have the endorsement of that association (62 A. B. A. Rept. 789-850 (1937)). The house of delegates approved the recommendations of the committee with respect to intradepartmental boards of review and judicial review "as a declaration of principle," with the contents of the bill to be subject to approval by the board of governors. A revised draft was approved by the board of governors, and introduced by Senator Logan as S. 3676, Seventy-fifth Congress, third session (62 A. B. A. Rept. 334 (1937)).

S. 3676, Seventy-fifth Congress, third session, proposed to establish a United States Court of Appeals and Administration to receive, decide, and expedite appeals from Federal commissions, administrative authorities, and tribunals in which the United States is a party or has an interest. The court would have consisted of a chief justice and not to exceed 40 associate justices. This proposal was not new. It was discussed in the August 1933 American Bar Association Journal, beginning at page 471. It had been commented upon by the special committee on administrative law in 1933 and 1934 (58 A. B. A. Rept. 203, 427 (1933); 59 A. B. A. Rept. 550 (1934)). Hearings on S. 3676 were held by a subcommittee of the Senate Committee on the Judiciary on April 1, and 5, 1938, but no further action thereon was taken.

At the annual meeting of the American Bar Association in Cleveland, in 1938, the only action taken on the report submitted by the committee on administrative law was that of the house of delegates directing that a bill be submitted to the house of delegates and the board of governors for consideration (63 A. B. A. Rept. 331-368 (1938)).

On January 3, 1939, Congressman Celler introduced H. R. 234, Seventy-sixth Congress, first session, to establish a United States Administrative Court to expedite the hearing and determination of controversies with the United States, and for other purposes. This bill was similar to the Logan bill, S. 3676, Seventy-fifth Congress, third session. It was superseded by S. 916 and H. R. 4235, Seventy-sixth Congress, first session.

Up to this time all proposals had been directed toward the establishment of a Federal Administrative Court, or the equivalent thereof. The first of the so-called administrative law bills was S. 915, introduced in the first session of the Seventy-sixth Congress by Senator Logan, to provide for the more expeditious settlement of disputes with the United States. An identical bill, H. R. 4236, was introduced by Congressman Celler.

The Logan-Celler bill (S. 915 and H. R. 4236) represented the first introduction in Congress of the American Bar Association legislative proposals on this subject, these bills having received formal approval of the American Bar Association by action of its board of governors and its house of delegates at their meetings in Chicago in January 1939. (See American Bar Association Journal, February 1939, pages 93-102.) The bill as submitted by the association's special committee on

administrative law was amended before being approved. The committee was directed by the house of delegates to take such action as might be necessary to obtain enactment of the endorsed bill (64 A. B. A. Rept. 281 (1939)).

S. 915 was reported by the Senate Committee on the Judiciary, with amendments, on May 17, 1939 (S. Rept. 442, 76th Cong., 1st sess.). The bill was passed by the Senate on July 1, 1939, but restored to the calendar by adoption of a motion to reconsider. H. R. 6324, practically identical with S. 915, as amended and passed by the Senate, was introduced by Congressman Walter.

An annotated copy of S. 915 as passed by the Senate was published on February 8, 1940, as Senate Document 145, Seventy-sixth Congress, third session. An analysis of this proposed legislation was printed in the Congressional Record of April 18, 1940, at pages 7225-7228. An article discussing it was printed in the Congressional Record of May 1, 1940, at page 8242-8248.

S. 915, H. R. 4236, and H. R. 6324 departed from the administrative court bills by providing for the "implementing" of administrative rules.

The administrative court bills, however, continued to be presented to the Congress. S. 916 was introduced by Senator Logan, and H. R. 4235 was introduced by Congressman Celler. These bills, proposing an administrative court of a chief justice and 10 associate justices were similar to earlier bills on that subject.

On February 24, 1939, the Attorney General announced the appointment of a committee to be known as the Attorney General's Committee on Administrative Procedure, to study the practices and procedure of the various administrative agencies of the Government, with a view to determining to what extent improvements were desirable. The Attorney General's Committee requested the committees of the respective Houses of Congress to defer action on any of the administrative law or procedure measures then pending until after the Committee had completed its study and made its report and recommendations.

H. R. 6324, which was practically identical with S. 915 as passed by the Senate, was reported by the House Committee on the Judiciary, with slight amendments, on July 13, 1939 (H. Rept. 1149, 76th Cong., 1st sess.). It was passed by the House on April 21, 1940, by a vote of 287 to 97, and sent to the Senate. The bill was reported by the Senate Committee on the Judiciary on May 9, 1940, and passed by the Senate, with amendments, on November 26, 1940. The Senate amendments were agreed to by the House on December 2, 1940. This bill, which had become known as the Logan-Walter bill, was vetoed by the President on December 17, 1940. The veto was sustained by the House by a vote of 153 to 127, making Senate action unnecessary.

In view of the fact that the Logan-Walter bill, S. 915-H. R. 6324, was pending in the Congress, the report of the special committee on administrative law was received at the annual convention of the American Bar Association, at Philadelphia, in 1940, and no action taken thereon (65 A. B. A. Rept. 215-220 (1940)).

The final report of the Attorney General's Committee on Administrative Procedure was dated January 22, 1941, and transmitted to the Senate by the Attorney General on January 24, 1941 (S. Doc. 8, 77th Cong., 1st sess.).

The report of the Attorney General's Committee on Administrative Procedure was followed by the submission to the Congress of three sets of bills. Bills to carry out the recommendations of the minority of that Committee were introduced as S. 674 and H. R. 4238, in the first session of the Seventy-seventh Congress. Bills to carry out the recommendations of the majority of the Committee were introduced as S. 675 and H. R. 4782.

At practically the same time there were introduced S. 918 and H. R. 3464. This bill soon obtained the label of "A. B. A. bill," although it did not represent the views of the American Bar Association. At the annual convention of the American Bar Association in Indianapolis, in 1941, the special committee on administrative law submitted, for adoption by the house of delegates, a resolution approving a "statement of principles" set forth in its report (66 A. B. A. Rept. 439-454 (1941)). This "statement of principles" was immediately followed by a paragraph stating that S. 918 and its companion bill H. R. 3464 "substantially comply with the foregoing statement of principles. The fact is mentioned here as a matter of record only, as we are not recommending the approval of the exact terms of any of these bills." A somewhat similar statement is found in an article in the American Bar Association Journal of March 1941, at pages 151-152.

The "statement of principles" was amended by the board of governors, the amendment being concurred in by the committee. The amendment expressed the opinion that S. 674 "is the bill which up to this time best embodies the above statement of principles." The statement of principles, as amended, was adopted by the house of delegates (66 A. B. A. Rept. 404 (1941)).

Then came Pearl Harbor, and the war. For the next 2 years the special committee on administrative law devoted its energies to the development of the Conference on Administrative Law and other matters covered in its annual report (67 A. B. A. Rept. 226 (1942)).

The situation was reviewed by the committee in its report for 1943. In a supplemental report submitted at the annual meeting in Chicago, in 1943, the committee noted indications of renewed public and congressional interest in the subject of administrative procedure, and submitted a tentative draft of material for Federal legislation on the subject, and urged the perfecting of a comprehensive proposal in order to provide detailed proposals upon which attention could be focused, serve as mutual provisions for reference, and furnish a draft for consideration in the adoption of a general administrative procedure statute (68 A. B. A. Rept. 249-253, 254-257 (1943)). The house of delegates approved the recommendations of the committee (68 A. B. A. Rept. 148 (1943)).

At a meeting of the house of delegates of the American Bar Association, on February 28-29, 1944, a comprehensive bill to improve the administration of justice by prescribing fair standards of procedure was approved without a dissenting vote. American Bar Association Journal, April 1944, pages 181-189.

On March 2, 1944, Congressman Gwynne introduced H. R. 4314, Seventy-eight Congress, second session, which would give effect to many of the American Bar Association recommendations in the form in which they were embodied in earlier drafts. The Gwynne bill was not, however, the American Bar Association bill in the perfected form which was approved by the house of delegates.

The American Bar Association approved bill was introduced in the second session of the Seventy-eighth Congress by Senator McCarran, as S. 2030 and by Congressman Summers, of Texas, as H. R. 5081. No action was taken on either of these bills.

Also introduced in the second session of the Seventy-eighth Congress was H. R. 5237, by Congressman Smith, of Virginia, to carry out the recommendations of his Select Committee to Investigate Executive Agencies, as contained in the sixth intermediate report of that committee (H. Rept. 1797, 78th Cong., 2d sess.).

S. 7 and H. R. 1203, introduced in the first session of the Seventy-ninth Congress, are similar to S. 2030 and H. R. 5081, and represent the latest recommendations of the American Bar Association for legislation to improve the administration of justice.

(The following bills relating to administrative procedure have also been introduced in the Seventy-ninth Congress: H. R. 184 (Celler), similar to S. 675, H. R. 4782, Seventy-seventh Congress, to carry out recommendations of majority of Attorney General's committee. H. R. 339 (Smith) similar to H. R. 5327, Seventy-eighth Congress. H. R. 1206 (Walter), similar to S. 674, H. R. 4238, Seventy-seventh Congress, to carry out recommendations of minority of Attorney General's committee.)

Mr. MILLER. I come now to a subject that I think I shall have to discuss at some length, and I promise you, first of all, I am going to be as brief as I possibly can in all of my presentation and it may be of some interest to say I hope to complete it this forenoon.

The CHAIRMAN. That is very gratifying.

The committee has, of course, full knowledge of the report of the Attorney General's Committee on Administrative Procedure. I would like, with the permission of the Chair, to take a little time to discuss that report.

Mr. WALTER. Which one of the reports are you referring to?

Mr. MILLER. The Attorney General's committee report on administrative procedure.

Mr. WALTER. There were four filed.

Mr. MILLER. I am thinking of it as a whole; and between the minority and majority there were differences, but I am trying to deal here with all of them.

The CHAIRMAN. Mr. Miller, I am not quite sure what you have in mind, but I am sure what the committee needs. The historical aspect of this matter is of interest to the committee and probably of general interest, but what this committee wants to know now is what sort of

legislation in the judgment of the gentleman who is addressing the committee, and his associates, ought to be enacted.

Mr. WALTER. If I may interrupt: Certainly, with regard to the review of the courts themselves of decisions of administrative agencies.

The CHAIRMAN. I do not want to disturb what you have in mind as to an orderly procedure, but what we are anxious to get is usable information.

Mr. MILLER. Mr. Chairman, I think if I explained to you what I propose to do, you will be able to judge as to whether you want it discussed, bearing in mind that I am simply trying to be just as helpful to the committee as I can.

The CHAIRMAN. I understand.

Mr. MILLER. In the consideration of this subject, quite naturally since 1941, when the Attorney General's committee submitted its report, the consideration has been based upon what that committee did.

The CHAIRMAN. We are not interested in going into that now; we are interested in what you want us to do now.

Mr. MILLER. What I have proposed to discuss, what I had planned to do, was to try to state what this committee pointed out it thought should be done.

The CHAIRMAN. We want you to point out what you think ought to be done. A great deal of this has shifted; changes have occurred along the road, and what we want you to do now is to discuss it from the standpoint of what you think we should do.

Mr. MILLER. That phase of it will be discussed by Mr. McFarland, and I will not attempt to repeat; and I do not want to put anything in the record except what is agreeable to the committee.

Mr. Chairman, what I had planned to do was to give you the picture as presented by the report of the Attorney General's committee.

The CHAIRMAN. I do not believe we are particularly interested in that at this time. What we want to know now is what the gentleman who is here before us believes should be done.

Mr. WALTER. Some of us are aware of the reasons for the creation of the Attorney General's committee.

Mr. MILLER. I know that is true.

The CHAIRMAN. I know that the committee is tremendously interested in what should be done now.

Mr. MILLER. I appreciate that, Mr. Chairman, and that matter will be the subject which Mr. McFarland will present to you.

The CHAIRMAN. That is what we want to get at.

Mr. MILLER. I think that being true, Mr. Chairman, I would simply state that we are trying to make our presentation as flexible as possible as we did not know what the committee would want.

The CHAIRMAN. We need help and we need help badly.

Mr. MILLER. In view of what the chairman has said, and in view of the fact that Mr. McFarland is to discuss the details of the bill I will give way to him now.

The CHAIRMAN. You have done a very helpful thing; you have given us for the record the history of the development of this bill and we appreciate it, but we do want to get at the facts.

Mr. MILLER. I appreciate that very much, Mr. Chairman, and as I say, we were trying to make our presentation as flexible as possible, and we do not have any written statements because we did not want

to burden the committee with anything that it was not particularly interested in.

The CHAIRMAN. We are glad to have the history of the matter presented to us but we do want to get down to the consideration of what the gentleman appearing before thinks should be done now.

Mr. MICHENER. Mr. Chairman, I do not want to seem discourteous, but I must be on the floor at 11.

The CHAIRMAN. We understand that, Mr. Michener.

Mr. MILLER. Mr. Chairman, I will give way and ask Mr. McFarland to discuss the details of the measure.

I would like to have inserted in the record at this point the report of the Attorney General's Committee on Administrative Procedure.

The CHAIRMAN. It may be inserted in the record.

(The document referred to is as follows:)

#### REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

The report of the Attorney General's Committee on Administrative Procedure was published as Senate Document No. 8, Seventy-seventh Congress, first session (1941), and is captioned "Administrative Procedure in Government Agencies."

The committee submitted its report to the Attorney General on January 22, 1941, and the Attorney General transmitted it to Congress on January 24, 1941.

I shall not attempt a detailed summarization of that report. However, in the interest of proper orientation, I should like, at this time, to give the committee a panoramic view of the report.

The committee was appointed in February and March of 1939. It consisted of six law professors, two judges of our local courts, one from the United States Court of Appeals and one from the United States District Court, the Solicitor General of the United States, and three lawyers in private practice.

Necessarily, in any group so constituted there are to be found conflicting opinions and philosophies. The surprising thing in this report is that as to most things there was not a great deal of difference of opinion expressed. The committee did, however, divide into two groups, one as the majority and the other as the minority. The majority consisted of five law professors, the United States district court judge, the Solicitor General of the United States, and one lawyer in private practice.

The minority was composed of one law professor, the United States Court of Appeals judge, and two lawyers in private practice. I make this point in order to dispel any idea that the difference in views, or the division, was between the law professors and the judges and practicing lawyers as such.

It is well, I think, to keep in mind the specific duties that were assigned to the committee. Its first duty was to make a thorough and comprehensive study of existing practices and procedures. Its second duty was to suggest improvements, if any were found to be advisable.

The committee studied 33 agencies, and submitted 27 monographs dealing with the procedures of those agencies.

Any discussion of the report, dealing with conclusions and recommendations, must necessarily deal with the general recommendations which are applicable to all the administrative agencies.

One of the first things we learn from this report is that administrative agencies are not as new as we sometimes look upon them as being.

The report points out that three administrative agencies were created by the Congress during its first session. These agencies were the predecessors of the present Bureau of Customs and the antecedent of the present Veterans' Administration.

The report discusses the reasons for the creation of administrative agencies. These reasons, as we all know, are varying.

The committee reached the conclusion that the administrative process is not an encroachment upon the rule of law, but is an extension of it.

I should like to discuss now, as briefly as I know how, some of the recommendations of the committee.

The committee recommends that members of administrative agencies should delegate functions to subordinates, so as to have the time to decide, fairly and wisely, important matters affecting public interest and private rights.

The committee said that it has been impressed by the frequent reluctance of high officers charged with serious policy-making functions, to relinquish control over the most picayune phases of personnel and business management.

The committee recommends that agencies should publish their policies and internal structure and organization and their procedures.

The committee recommends that, except in unusual cases, decisions should be explained by writing reasoned opinions.

The committee refers to the sentiment among lawyers that only members of the bar should be permitted to practice before administrative agencies. I should like to quote briefly from what it says on this subject:

"The committee doubts that a sweeping interdiction of nonlawyer practitioners would be wise, nor does it believe that corporations or other organizations should in all cases be forbidden to appear through and be represented by their officers."

The majority of the committee would impose upon the Director of the Office of Federal Administrative Procedure, an office proposed to be created by both the majority and minority, the duty to investigate permission to practice before the several agencies in order to determine whether it can be centralized and controlled, with a view to eliminating needless delay and duplication in authorizing members of the bar to appear before agencies; regularizing the circumstances in which other than members of the bar may properly so appeal. This majority proposal recognized the right of nonlawyers to appear before administrative agencies.

The minority proposed two things: First, that the requirements for admission of attorneys or agents to practice, and the maintenance of formal registers of practitioners be omitted wherever practical. Secondly, that the OFAP may, subject to certain conditions, establish and maintain a central method for the registration for admission of attorneys and others to practice before the several agencies. The minority thus provided for the nonlawyer practitioners.

The committee proposed that, where admissions to practice are deemed necessary by any agency, attorneys admitted to practice in the highest courts of any State or Territory, or in any Federal court, should, upon written representation to that effect, be admitted to practice before such agency excepting, of course, the Patent Office.

The committee does not believe public hearings are necessary as a condition precedent to rule making, i. e., making of procedural rules. It does believe, however, that when possible, an opportunity should be given for persons to express their views, and that existing use of informal conferences and public hearings should be continued.

The committee says that regulations, as a general rule, should not be effective for at least 45 days after publication in the Federal Register. The committee takes the view that persons should have the right to petition for new rules or amendments of existing rules, and that the administrative agencies should report to Congress annually with respect to their rule-making activities. The committee opposed judicial review of administrative rules and regulations in general. The committee recommends the use of declaratory rulings as to the application of a rule where a person has an interest actually affected by the rule.

The committee rejected the view that the rule-making process is essentially the same as that of legislation, and that the legislative technique should be followed.

The committee reached the conclusion that there are four stages of rule making:

1. The investigation of the problems to be dealt with;
2. A formulation of tentative ideas of regulations;
3. The testing of these ideas;
4. The formulation of the regulations.

The committee was very specific in its recommendation that those who are affected by rules should have an opportunity to express their views with respect to those rules.

A considerable portion of the report is devoted to a discussion of the subject of informal procedures. The committee states that over 90 percent of matters coming before administrative agencies are informal procedures of one kind or another. The committee recommends that these procedures be improved in many instances.

The committee condemned the practice, in effect with some administrative agencies, whereby a person has to admit past guilt before he is allowed to consent to not violate a law in the future.

The committee recommends that in many instances where the statutes now require hearings, it would be enough to require the agency to give notice of the

proceeding, and if no protest is filed to then dispose of it without formal hearing.

Now, with respect to formal proceedings: The committee expresses the view that formal cases have an importance out of proportion to their numbers. What the committee says reminds me very much of what was said about Caesar's wife. The report states that not only should the decisions of the administrative agencies be impartial, but that the public should be convinced that they are impartial. Expertness and expedition are held by the committee to be essential.

The committee discusses and criticizes the length of hearings and the lengthy records in some cases. It is strong in its recommendation for prehearing conferences and stipulations of facts. The committee points out, however, with respect to prehearing conferences, that adequate authority must be given the representative of the agency who presides at such conferences.

The committee also recommends that all hearings be public, except, of course, where private and confidential matters are involved, such as in some of the proceedings before the Veterans' Administration.

The committee recommends the use by all administrative agencies of the so-called shortened procedure which has been so successfully used by the Interstate Commerce Commission.

The committee points out that the relaxation of common law rules of evidence in jury trials is a necessity in administrative hearings. The committee condemns the practice of some hearing officers in admitting evidence "for what it is worth," and says that such practices show indecision on the part of the presiding officer and result in unduly swelling of records.

The committee recommends a more extensive utilization of what we have come to call "official notice," but, at the same time, it says that this must be accompanied by what it refers to as "safeguarding mechanics." The committee says the parties should be apprised of what the agency proposes to take "official notice," and sets up procedure to carry that into effect.

The committee recognizes that the heads of agencies cannot personally hear testimony and make the initial decisions. It recognizes that examiners, or hearing officers, are a necessity. As a matter of fact, they are referred to as "the heart of formal administrative adjudication."

The committee states that good men are attracted to these positions where their importance is recognized and adequate salaries paid; where authority and independence of judgment are accorded; and where weight is given to their decisions. Where this is true, the committee finds that proceedings are well conducted and that the public has confidence in them.

The committee finds, however, that this situation does not exist throughout all of the administrative agencies, and proposes to correct that evil by setting up what are known as hearing commissioners instead of examiners. The committee suggests that these hearing commissioners should be men of ability, stature, and prestige. The committee says these men should be appointed for definite terms. The majority says 7 years—the minority says 12 years. The committee also says they should be paid substantial salaries.

According to the recommendations of the committee, these hearing commissioners would constitute a separate unit in each agency organization. They would have the same relationship to the agency as judges of lower courts have to appellate judges who review their decisions. Their functions would be limited to presiding at hearings or prehearing negotiations and to making initial decisions. They would be nominated by the agency, be approved and appointed by the OFAP. They would be removable only after hearing by a trial board independent of the agency to which the hearing commissioner is assigned.

Findings and decision of a hearing commissioner would become the final decision of the agency unless an appeal is taken by a party or review is ordered by the agency on its own motion. In reviewing the work of the hearing commissioners, agency heads would be limited to the specific grounds set out by the party seeking the review, or to the terms of the order of the agency directing the review. Conclusions and interpretations of law would be open to full review. Findings of fact, the committee says, should not be disturbed unless contrary to the weight of the evidence.

The committee suggests that oral arguments should be made before the boards or commissions, sitting as divisions when necessary. In the case of single-headed departments or agencies, the committee suggests that all pretense of personal consideration or decision should be abandoned, and boards of review or deciding officers created, with appeals to the agency head, in his discretion, and then personal decision by him.



The committee is in full agreement with the position that the same person should not be prosecutor and judge.

The committee recommends the creation of the Office of Federal Administrative Procedure, consisting of a justice of the United States Court of Appeals for the District of Columbia, to be designated by the chief justice of that court, the Director of the Administrative Office of the United States Courts, and the Director of Administrative Procedure, who would be appointed by the President, by and with the advice and consent of the Senate. Each agency would designate one of its responsible officers to serve as an adviser to the Director.

Functions of the OFAP would be:

1. To examine critically the procedures and practices of agencies which may bear strengthening or standardizing.
2. To receive suggestions and criticisms from all sources.
3. To collect and collate information concerning administrative practice and procedure.
4. To appoint hearing commissioners.

The committee suggests seven subjects which the OFAP might very well study, namely:

1. Admission to and control of practice.
2. The issuance of subpoenas.
3. The use of depositions.
4. Forms of briefs and pleadings.
5. Answers.
6. The availability of records, including the costs of transcripts of proceedings.
7. Reports required to be made of citizens—going into their necessity and their duplication.

With respect to judicial review, the majority of the committee found existing provisions for judicial review to be wise and recommended that they should be maintained.

The majority believed that judicial review, generally speaking, should be limited to whether the agency acted within the scope of its authority, whether the procedure was fair, and whether the decision was based on substantial evidence. The majority proposed, however, that if a wrong method of review is sought, or if action is brought in the wrong court, then the court (if it has jurisdiction) should grant review as if a proper method had been chosen or (if it does not have jurisdiction) transfer the case to the proper court.

With respect to judicial review, the minority of the committee had a different view. The minority said that the haphazard, uncertain, and variable results of the present system (or lack of it) constitutes a "major deficiency," and that the present scope of judicial review is subject to question by reasons of the interpretation of what constitutes substantial evidence.

The minority expressed the opinion that courts should set aside decisions clearly contrary to the manifest weight of the evidence.

In the view of the minority, present statutory formulas of judicial review fail to take account of differences between various types of fact determinations. The view is expressed that present standards of judicial review are unsatisfactory because they are determined by the usual case-to-case procedure of the courts. In this connection, the minority uses the statement: "Piecework process produces patchwork results."

The minority agrees that the recommendations of the majority, if carried out, would go very far to effecting major improvements. The minority, however, proposed a "code of fair standards of administrative procedure," to provide a "procedural pattern" to serve as a guide to administrators.

The minority believes that the majority does not go far enough with respect to the operation of prosecuting and judicial functions, the scope and practice of judicial review, and the need for a legislative statement of standards of administrative procedure. The minority discusses the "formlessness" of present procedure, and the need for legislative guidance.

The majority believed it to be the better part of wisdom to be content at this time with the several major steps the committee proposes, with future action depending upon experience with the operation of their proposals, and further studies by Congress, the agencies, and the suggested OFAP.

I appreciate, of course, that the foregoing is but a sketchy summary of the report, but, in the light of discussions that are to follow, I think it is perhaps all that needs to be placed in the record on this subject at this particular point.

## STATEMENT OF CARL McFARLAND, WASHINGTON, D. C.

Mr. McFARLAND. Mr. Chairman and members of the committee, my name is Carl McFarland. I am a member of the D. C. bar, and I am here as chairman of the American Bar Association's special committee on administrative law.

I shall attempt to assist the committee by discussing the structure and the provisions of the various bills that are before the committee. After all, most of these bills fall into a fairly standard pattern.

The CHAIRMAN. You are going to discuss the general subject?

Mr. McFARLAND. Yes.

The CHAIRMAN. Rather than the individual bills?

Mr. McFARLAND. I am not particularly interested in "A, B, C" bills.

The CHAIRMAN. That is right.

Mr. McFARLAND. All of these bills are drawn, and any intelligent measure must be drawn, on a functional basis. They do not relate to agencies by name. They relate to some of the specific kinds of things that administrative agencies do, just as legislation which you gentlemen have placed on the books relating to private individuals ordinarily does not relate to individuals by name but relates to what they do.

Furthermore, in this particular subject, no one has attempted to draw a set of rules of practice for any administrative agency. The whole idea has been to draw the skeleton, upon which administrative agencies may adopt their own rules of procedure.

All of these measures fall into a simple outline of three main points. The three subjects which they contain are: No. 1, public information; No. 2, administrative operation; and No. 3, judicial review. Every measure contains a series of formal provisions, such as title, definitions, effective date, and that sort of thing. Also, every measure contains some further provisions respecting some of the various incidents of administrative operation, the matter of appointment and status of examiners, the nature of the hearing, and the method of rendering decisions.

Administrative operation is the second of the three subjects, and necessarily divides itself into two parts, one relating to the making of general regulations, the second part relating to the determination of particular cases. Administrative agencies, despite all that has been said and all that has been tried, do nothing different than courts and legislatures do. They have invented new words, but nevertheless they legislate. They have invented new words, but nevertheless they adjudicate. They issue injunctions just as they issue statutes, and for those two different types of activities it is necessary that sharp distinctions be drawn.

It falls to me to discuss some of the details, and in discussing the operation of any measure—

Mr. WALTER (interposing). May I interrupt for just a question?

Mr. McFARLAND. Yes.

Mr. WALTER. As a member of the Attorney General's committee, you participated in the preparation of a volume of research. I wonder where those volumes are. I think our committee ought to have a complete set.

Mr. McFARLAND. You mean the monographs?

Mr. WALTER. Yes.

Mr. McFARLAND. I have a complete set and will be glad to let the committee have them. I know of no higher purpose that could be served by them. There are several volumes of hearings also, and there are reports and Senate hearings, perhaps, that would be of interest.

Mr. WALTER. I think that we ought to have the monographs that were prepared by the Attorney General's committee.

Mr. McFARLAND. There are about 27 of them, I believe.

Mr. WALTER. Where could we get them?

Mr. McFARLAND. They are public documents, Mr. Aitchison points out, and have been printed, although a good many of them are out of print. I will be glad to see that the committee has a full set.

Mr. WALTER. Thank you.

Mr. McFARLAND. As I go, I think it would be helpful to compare, in a word or two, the previous proposals—chiefly the proposals that were made by the so-called Attorney General's committee.

All of these bills fall pretty much in the same pattern: The definition of an agency is probably the only one that would cause some difficulty to anyone that looks at it cold. The three initial definitions are the definition of "agency," the definition of "rule making," and the definition of "adjudication." When you define an agency you still are not indicating very much about what any bill can do. The definition of an agency is merely an exclusionary device in all of these bills; it is a preliminary matter.

The first real subject of bills is the subject of public information. Most of the bills provide, and have in the last 5 or 6 years provided, that the agency should make certain kinds of rules. The Attorney General's Committee on Administrative Procedure was in favor and stated that one of the most serious aspects of the whole system was a lack of common, ordinary, simple information.

It is a curious thing about information here in Washington. Many people seem to have little interest in information. But west of the Appalachian Mountains and further west you will find that people are thinking about the problem of how to find out about administrative operations. Americans generally do not like to ask somebody; they want some official place where they can find out about the organization of the board or the committee or the commission. It is of little comfort to the ordinary person to be told that while there is no official statement, they can ask and will be told what they wish to know. The difference lies in a guarded oral statement and authoritative written information.

There seems to be no dissent from the provision respecting information. There was at one time considerable comment about the possibility that legislation, if attempted, would force the agencies to make substantive rules. In other words, the argument was that you cannot require an agency to make all necessary rules to cover all conceivable situations at one time. That is not proposed.

Mr. WALTER. Was not that a spurious argument, in view of the efforts of the people who are opposed to the philosophy of this type of legislation?

Mr. McFARLAND. I personally thought it was.

Mr. Gwynne. People have asked me from time to time where to get information as to the rules and regulations respecting the Wages and Hours Administration, which from time to time does make rules and

regulations. What, if anything, has been done about getting that information to the public who is interested in it?

Mr. McFARLAND. Of getting it to the public?

Mr. GWYNNE. Yes. What is being done now to provide interested parties in cases about the attitude taken by the Wages and Hours Administration in certain distinct questions?

Mr. McFARLAND. Of course, they have a distinction, in the first place, between general rules and special interpretations.

Mr. GWYNNE. Yes.

Mr. McFARLAND. The general regulations appear in the Federal Register.

Mr. GWYNNE. I am referring particularly to the interpretations.

Mr. McFARLAND. The interpretations of all Government agencies, without attempting to relate them to the wages-and-hours provision, are difficult to make sure of. They are not subject to the Federal Register Act in the sense that they must be published. So, a good many agencies have two kinds of interpretations; those which they let people see and those which they reserve. There are undoubtedly some kinds that you possibly should not let people see—such as those that relate to housekeeping.

Mr. GWYNNE. To what?

Mr. McFARLAND. To housekeeping, to personnel, and that sort of thing. There seems to be complete agreement, so far as I can discover, that if an agency intends to relate the regulation that is in effect to the public there should be some central place for the public to find it.

The CHAIRMAN. Mr. McFarland, what would be the objection to publishing all of them in the Federal Register?

Mr. McFARLAND. I believe the objection you will find to it would be that the volume would be too great.

The CHAIRMAN. I thought that would be the answer.

Mr. McFARLAND. I do not believe there is a great deal of objection in the field of public information as long as it can be found, because someone can compile that information and make it available.

I am sure that no agency has deliberately attempted to withhold information. I do think in the business of Government there are times when administrators rather neglect to think about the problem of the fellow who is trying to find out.

The CHAIRMAN. Mr. McFarland, I believe that the committee will agree that there ought to be publicity. Now will you go to the point about how you propose to get it to the public?

Mr. McFARLAND. The only suggestion that has been made, and the only suggestion that seems feasible, is one which would require, under positive mandate of law, that the organization send into the central point a statement of their procedural rules and methods, followed by publication in the Register. The Attorney General's committee feels that there is a very serious defect in the Federal Register Act because it made no requirement that organizational and procedural rules should be made.

It is admitted that you cannot require agencies to make rules for all circumstances, but you can require them to formulate and publish their rules and methods of procedure.

The CHAIRMAN. Mr. McFarland, to get the matter clear in my mind, you say the Federal Register does not require the making of rules; and of course if they do not make rules, they cannot publish them.

Do you mean to say that some of these departments and agencies are acting without rules and regulations?

Mr. WALTER. They make rules from day to day.

Mr. McFARLAND. I am not speaking of those.

Mr. WALTER. No; no.

Mr. McFARLAND. I am speaking of the procedural rules.

The CHAIRMAN. You are moving somewhat now from the matter of publicity into the discussion of what should be publicized, is that right?

Mr. McFARLAND. Yes; I am making my answer to the point that only certain things should be required to be made and published.

It would be impossible, impractical, for us to say to an agency, to make all your rules, substantive and procedural for every case and every circumstance today before you start operating. But it is fair and it is feasible to require administrative agencies to make their rules of procedure, give people guidance as to how they may proceed, before the agency starts operating.

The second thing that can be done is to state, in the matter of orders and decisions, that agencies shall either publish them or have a central repository where people can get them. The repository, I think, is sufficient, because various commercial publishing houses take these things and get them around.

Mr. GWYNNE. In that connection would it not be possible to get out a report something like the Attorney General's statement? He gets out a volume of opinion which is very useful.

Mr. McFARLAND. Most of the agencies do that; the Interstate Commerce Commission reports, for example.

Mr. GWYNNE. What about the Wages and Hours Administration? There are a number of things that are passed on by them.

Mr. McFARLAND. It is the practice to get out such statements. The Wages and Hours Administration publishes various interpretations—you can get them in the looseleaf volumes of commercial publishers.

Mr. GWYNNE. I mean something that would be helpful to the businessman who wants to comply with the interpretations that are laid down with respect to the Wages and Hours Act. He ought to be able to find what those rules and regulations are.

Mr. McFARLAND. Of course, the Wages and Hours Division and many other agencies get out pamphlets which people can secure at a very modest cost, or none.

Now, we come to the main part of any statute, and that is the matter of administrative operation. As I said a while ago, none of these statutes propose to say precisely how agencies shall operate but they do attempt and necessarily must attempt to lay down some skeleton or framework.

I would like to epitomize this operation matter very briefly. There are two kinds of operations as all studies have indicated and any practitioner knows: Number 1, the issuance of a general regulation, which is similar to a statute; Number 2, the matter of an adjudication, similar to the judgment of a court.

Now with respect to number 1, the issuance of general regulations: There seems to be fairly complete agreement that you can provide and you should provide only for one thing. That is that, unless Congress in some other statute has required the regulation to be made upon hearing, the only thing that should be required is for the agency to give notice of making of any substantive rule and allow people to submit at least in writing their suggestions and to consider them before the issuance of whatever regulations are made.

Mr. WALTER. Procedural regulations?

Mr. McFARLAND. Or substantive, prior to the issuance of such regulations.

Mr. WALTER. May I interrupt you there?

Mr. McFARLAND. Yes.

Mr. WALTER. What you are suggesting is the method that has been followed by the Maritime Commission for a number of years and it has worked out very satisfactorily.

Mr. McFARLAND. Many agencies operate in that way. For instance, the Interstate Commerce Commission will do a great deal by consultation. The industry being organized, they can call in committees and go into any matter.

Incidentally, no proceeding ought to be required with respect to procedural regulations, interpretative regulations, or statements of policy. That is, the agency should be as free as it can be in that respect for the simple reason that those types of regulations are the kind that agencies should be encouraged to make, the procedural rules, interpretative rules, statements of policy, and things like that—

The CHAIRMAN. Mr. McFarland, let me interrupt you. The interpretative regulations of substantive regulations become very definitely substantive.

Mr. McFARLAND. The interpretative?

The CHAIRMAN. The interpretative regulations of substantive regulations, because the interpretation is what affects these people.

Mr. McFARLAND. That is right.

The CHAIRMAN. What do you think can be done with respect to that type of regulation; is it to be publicized?

Mr. McFARLAND. Yes; it should be publicized.

The CHAIRMAN. I think I misunderstood you.

Mr. McFARLAND. In the issuance of regulations, the procedure required should be limited to substantive regulations and should require no more than that the agency give notice to the parties in some way, with an opportunity for them to present their views.

Now, there is another point that seems to be fairly well agreed upon, on that same subject, and that is that the rules of an agency, before finally going into effect, should be deferred for, say 30 days, for two principal reasons: One, so that if they have overlooked something someone may call it to their attention so that an amendment can be made before the effective date. Secondly, so that the parties have a chance to adjust themselves.

Mr. WALTER. Do you provide any way of attacking the regulations thus made?

Mr. McFARLAND. By judicial review?

Mr. WALTER. Yes.

Mr. McFARLAND. Yes.

Mr. WALTER. That is very important, because the regulations, of course, become law, and it might very well be the result of arbitrary or capricious action, and unless you can attack the interpretation there would be little advantage in expressing your views on them.

Mr. McFARLAND. Yes.

Mr. GWYNNE. You would provide, for instance, that the attack might be made on a regulation, but do you provide that the person making the attack may do so even though he is not a party to the suit; for instance, where there is some regulation made that affects agriculture where the individual party is going to be affected, can there be a provision whereby someone who had an interest perhaps in agriculture could make some kind of an attack on that kind of regulation?

Mr. McFARLAND. Of course, you are getting to my third subject; and I might as well try to answer now. What you speak of is a case where some person who is not drawn into the suit but who has a general interest in the subject seeks to attack the regulation. I suppose the taxpayers' suit would be in point.

Mr. WALTER. I think Mr. Gwynne's question is answered by the case of *Lukins v. Perkins* in the Supreme Court, where the court held that the Lukins company had no interest, despite the fact that it was in position to submit a bid on certain Government work.

Mr. GWYNNE. What I have in mind is whether there is any provision made for the method of appeal to the court by a person even though he would not be in the case in controversy in the court. Is that situation in this bill?

Mr. McFARLAND. I do not believe it is.

The CHAIRMAN. Mr. McFarland, you observe the interest the members have in that particular feature, and if the committee has not given consideration to it, it seems to me that some consideration should be given to the question of determining whether or not the person who feels or knows that a situation is involved in which an operation in which he is engaged may possibly be subject to penalty because of some regulation that has been adopted, should have an opportunity to attack that regulation in court.

Mr. WALTER. I do not think that is what Mr. Gwynne had in mind.

Mr. GWYNNE. Take this specific case, where under the Wages and Hours Act they had certain areas of production, and the Wages and Hours Administration issued various interpretations and regulations concerning that.

Now, that affects canners and farmers generally that are represented pretty much by an organization; they have a counsel and the general consensus of opinion, we will say, is opposed to the interpretation put upon the act by the Wages and Hours Administration. Now, could somebody representing that group or company go into court or must they wait until some individual farmer is affected and takes the case into court?

Mr. McFARLAND. I think that is very possible; that is done through a representative suit.

Mr. GWYNNE. Would they have to have an actual suit?

Mr. McFARLAND. That would come under the head of declaratory judgment?

Mr. WALTER. That is dealt with in section 211 (a) in H. R. 1206, Mr. Gwynne. That is what we were trying to do when we wrote that section.

Mr. CRAVENS. If you let anyone make an attack on a regulation, would that not permit someone to make an attack on some regulation that may never have any effect on him at all?

Mr. MCFARLAND. Well, that is true. I think it is a question of where you are going to draw the line. If you have a regulation which is going to affect you and if you are able to do something and you want to do something and you are in the position where you are threatened, the standard equity law says, with the legal consequences if you proceed, you are, under present law, entirely capable of going into court and having an adjudication.

The CHAIRMAN. May I suggest, Mr. McFarland, that I think possibly that particular feature has been pretty well covered, and that you pass to the next matter?

Mr. MCFARLAND. Now to get back to the matter of general regulations, I would like to repeat again that the present agreement seems to be that parties ought to be allowed to submit their views in those cases where more formal procedures are not required by present statute. Secondly, that there should be a deferred effective date provided, insofar as may be practical, in a given case.

Then there is a third proposal which I think you will find in almost all bills, and in which the Attorney General's committee was particularly interested, and that is that the right of petition should be accorded to private parties in administrative procedure, the same as the Constitution accords to citizens in connection with congressional processes. That is the right to ask to have the regulation modified; the right to petition; the right to ask an agency to modify or to rescind a rule.

That is about all anyone has proposed in connection with rule making, and there is no great area there for difference.

Mr. GWYNNE. What about the retroactive effect of regulations?

Mr. MCFARLAND. That is quite a subject in itself.

Mr. GWYNNE. Do these bills provide that the individual is protected against that?

Mr. MCFARLAND. Yes; there is provision respecting that in one or two of the bills. In connection with retroactivity, there are various problems. One is the retroactivity of curative regulations.

Now, to repeat, there are two kinds of administrative operations, the legislative operation called rule making which we have discussed, and adjudication which is sometimes called an accusatory procedure. That is a procedure where an agency comes forward and points its finger to a given person or to a company and says, "You have sinned and we will proceed to try you."

In connection with adjudication, all these measures provide that notice shall be given; and there is no dissent to that. The Attorney General's committee gives a great deal of attention to administrative notice. It thought that administrative notices were rather seriously deficient and made recommendations for greater specificity. None of the measures attempt doing more than point out that persons should be notified of the time, place and nature of the proceedings, the authority under which the agency is acting, and the issues.

Secondly, in connection with the accusatory proceedings or adjudication, all the measures provide that the procedure shall be twofold: First, an opportunity for informal settlements, so far as the nature of



the proceeding may permit, and if that does suffice, then a hearing. But none of the measures, I think, with one exception, provides that the procedure in respect to adjudication shall apply to any case unless Congress has specifically, by some other statute, required an administrative hearing. But if the case is required by statute to be heard by an administrative agency, all of the various bills provide that the hearing shall be conducted in a certain way. First, upon notice; second, upon specified procedure.

The thing that causes most comment in this field is simply the matter of separation of functions. That is the old question of the judge-prosecutor-investigator combination. There are a great many misconceptions about the judge-prosecutor combination. In the first place, it is not applied in some of the bills to the formulation of rules as distinguished from accusatory procedure. But all of them apply it to the latter. The same may be said respecting license applications.

Several proposals have been made. The first is that there be absolute separation of the administrative prosecution arm from the judicial arm—in other words, that the agency should be constituted on the model of the old Board of Tax Appeals and the Bureau of Internal Revenue: Let one do the investigating and the other do the deciding. The minority of the Attorney General's committee differed mainly on that one point. The late President Roosevelt, in 1937 I believe it was, also made a rather sweeping proposal to the Congress to take all agencies and separate the deciding from the prosecuting and administrative functions. None of the bills here attempts to adopt that technique, but they do adopt what is known as an "internal" separation of functions. That is, they rely solely on an injunction to the agencies that in all accusatory proceedings the prosecutor-investigator should not take part in the decision process other than in open court, as it were.

The last incident of adjudication is the matter of declaratory orders. There seems to be general agreement that the agencies ought to have no authority to issue declaratory orders. But there has been one field of difference in connection with declaratory orders, and that is whether or not they should be mandatory or discretionary. However, declaratory orders will necessarily be given or withheld in the sound discretion of administrative agencies. They may be improvidentially granted. They may be improvidently refused. The whole question is simply what form of language would best express the authority that ought to be conferred.

I have mentioned the first main subject of "information" and the second main subject of "operation." Now, there are a series of what you might call subsidiary matters. There is the question of appearances, the question of subpoenas, and things of that kind. I think it is unnecessary to take the time of the committee on those subjects, except to say one thing: There seems to have been a great deal of misconception about the matter of appearances.

A great deal of complaint has been received from two sources. Number one is the lay practitioners before the various agencies, chiefly the Interstate Commerce Commission, who are afraid something might be said that would oust them from practice. On the other hand, there is a great deal of protest from the committees on unauthorized practice of the law in various State, local, and municipi-

pal bar associations who are just as vehement in saying that these measures fail to recognize that legal procedure must be confined to lawyers. But these bills do not eliminate the lay practitioner, if the administrative agency feels they have a function to perform and desires to admit him to practice.

Mr. WALTER. You say "if the agencies feel they have a function to perform." Do you mean by that you would require members of the bar in good standing in the court of last resort in the State to submit an application to practice before people who are probably not qualified to be admitted to the bar, as are their members?

Mr. MCFARLAND. I was not speaking of the bar at all; I was speaking of nonlawyers. On the subject you raise, Congressman Walter, we do not feel we should take any position on that, either.

Mr. WALTER. Do not you think it might be well to incorporate in this law a provision that would make it possible for any member of the bar in good standing to practice before any agency, without being required to submit a formal application?

I ask that question for this reason—not because it has happened to me two or three times, because that is immaterial; but I know of instances where members of the bar, very reputable men of high standing and great ability, have come here with clients and been refused permission to practice and have been compelled to go into Washington and hire some specialist only because somebody had passed on the qualifications of this alleged specialist.

Mr. CRAVENS. Let me say that H. R. 339 and H. R. 1117 provide against that situation. They provide that any attorney in good standing in any Federal court, or the highest court of a State, do not have to make application.

Mr. MCFARLAND. Congressman Walter, there is a question whether or not that might be included; but, as a group of lawyers, we do not wish to be in the position of asking for any special protection for lawyers.

The CHAIRMAN. You do not want to do that in this bill?

Mr. MCFARLAND. That is right.

The CHAIRMAN. What is to be done about it does not concern this hearing.

Mr. CRAVENS. The provision to which I refer does not exclude anyone else from practicing besides lawyers; it merely says if a man is a lawyer, then he does not have to go through the routine and rigmarole that lots of those fellows do, and get a little card.

Mr. MCFARLAND. Now, all of these measures have defined the operations of the agencies in two respects. All of these measures contain sections on hearings and on decisions. The hearing section usually provides—I think they all provide—that the case may either be heard by the top men of the agency or by examiners who may have certain powers, and so on, for reducing the matter to record. The only serious question in all of the bills relating to hearings is the question of the rules of evidence. The rules of evidence furnish material for more debate, almost, than any other subject in this field.

Mr. WALTER. In that connection, I have always felt that perhaps the way to meet this situation would be to provide expressly that the rules of evidence in the District of Columbia shall be the rules.

Mr. CRAVENS. No; do not impose that on us.

Mr. WALTER. Well, they have very good rules.

Mr. McFARLAND. Thinking on that subject has gone through a good many stages. There is a good deal of suggestion that the equity rules should apply, because that means a court without a jury, and I believe some of the agencies, either by statute or by their own rules, apply the equity rules as they exist in the District of Columbia. Then there has been another distinction some people have attempted to draw between the rules of evidence and the principles of evidence, and some have even mentioned "standards" of evidence. The difficulty is, however, that you can find no body of Federal rules, standards, or principles of evidence.

The Attorney General's committee took the position that the agency should admit or should rely only on relevant, probative, and reliable evidence. Those are the three words which they use to make up the standard, and the courts have used them. We are inclined to believe that is about the best formula that can be devised.

On the matter of decision: As I say, all of these measures contain sections on hearings and sections on decisions. In connection with decisions, there is an interesting difference between measures that are now pending and those which grew out of the Attorney General's committee. The Attorney General's committee had the idea that if a subordinate official were to hear the case he should absolutely make the decision. The theory of that was that, having heard the case, he was the logical party to decide it. The second theory was that only by giving the examiner the deciding function could you give him enough stature so that he would become a real figure in the operation of administrative justice.

The bills, those that have been introduced subsequently, do not adopt that absolute requirement. They provide that the agency can decide whether the examiner should decide the case or merely recommend a decision. That seems to us the sounder approach because we are not prepared to say that there may not have to be adjustments and there may not have to be differences in different kinds of cases; and furthermore we think that it is probably immaterial whether the subordinate official who heard the case makes the decision or whether he simply recommends a decision.

There are various proposals regarding sanctions, which I think we could pass over because no particular controversy has developed.

Most people are somewhat puzzled about just how the examiner should be selected and how his tenure should be secured. The separation of functions; I think, can be reduced to a formula. The selection of an examiner has not reached that stage of agreement.

Several proposals have been made. The proposal in many of the bills is for a simple civil-service status. The Attorney General's Committee on Administrative Procedure proposed a special office to approve examiners and to exercise the power of removal. That officer, called a director, was to be appointed by the President and confirmed by the Senate; and there are to be two ex-officio members.

Mr. WALTER. On the other hand, is there not the danger of the man having in mind possibly that he can be removed; might be subject to the influence of somebody in the office of the Administrator?

Mr. McFARLAND. This question has been discussed, I suppose, with more sincerity and less heat than almost any other question.

The third proposal has been made recently, and that is that either the selection or the approval of the examiner be vested in some official appointed by the Judicial Conference. That was put forward as a rather good solution because it would fit into what was conceived to be a nonpolitical office and therefore would require less provision concerning how it should operate. However, that presents a very serious constitutional question as to whether you could have the Judicial Conference make the appointment of an executive official when the Constitution vests the power of appointment only in the President, the head of a department or a court. The Judicial Conference is not a court.

Perhaps the solution will be ultimately either civil service or some official or officials appointed by the President with the consent of the Senate if you are going to have a special group where selection of examiners is made or approved.

The CHAIRMAN. Mr. McFarland, may I ask a question before you leave that subject: I believe everyone regards it as one of the most important suggestions proposed. If you are going to guard the selection of the examiner as is proposed, would you be able to get before any court that reviews the matter a finding of fact made by the examiner as distinguished from the determination of the facts by the agency itself that makes the determination?

Mr. McFARLAND. I believe all the bills anticipate that the examiner's decision or recommendation shall, including the finding of facts, be a part of the record.

The CHAIRMAN. Anyhow that can be taken care of.

Mr. McFARLAND. Yes.

Mr. CELLER. Do I understand the Attorney General's committee wants all decisions or determinations of the agency to be filed before the court?

Mr. McFARLAND. As I mentioned, they might not be decisions, they might be tentative decisions or recommendations.

Mr. CELLER. It would be an agency, a tribunal of some sort, to pass upon and make a determination. I understood you to say that you wanted that; but that would be the contrary view?

Mr. McFARLAND. I must have expressed myself incorrectly. The Attorney General's committee, which ceased to function 4 or 5 years ago, recommended that the examiner make the final decision forthwith. We felt, and I think the bills provide, that the agency should itself determine whether or not the examiner should make the decision.

Mr. CELLER. Then I misunderstood you.

The CHAIRMAN. In the event the agency itself has functioned, or is to make a determination, is it contemplated that the agency, if it appears from the record that additional facts are needed, shall take additional testimony?

Mr. McFARLAND. Yes.

The CHAIRMAN. Under such a situation is there an arrangement in the bill that the findings of fact by the examiner will go up as a part of the findings of fact of the agency itself rather than the final judgment to be considered?

Mr. McFARLAND. I am positive that should be done.

Mr. GWYNNE. Mr. McFarland, I notice that H. R. 1203 does not cover temporary wartime agencies. Is it not true that those are the

agencies that really are giving rise to the thing that you are trying to correct? This does not cover temporary wartime agencies.

Mr. McFARLAND. No.

Mr. GWYNNE. Such as the OPA. I cite that as exhibit A to the statement I just made. Do you think it would be impractical to apply this bill to special agencies of that kind?

Mr. McFARLAND. Well, personally I used to think that the bill should apply across the board. I was dissuaded from my view, and the view of our committees is that they ought to be exempt. I think there are some practical reasons for doing that. I think perhaps exemptions ought to be of a definite determination, as of a certain time. No measure of this kind can be put into operation over night and by the time it really gets to operation, presumably, the war-agencies problem will be moot.

Mr. CELLER. Some agencies may continue after the war. Some people think the OPA may have things to do for some time after the war, and do you not think there ought to be some provision with respect to such agencies as the OPA or the WPB if their activities continue beyond the war?

Mr. McFARLAND. I think if you examine this measure very carefully you will find that the OPA and other war legislation fits into it very nicely, and that their operations will not be unduly injured in any way.

Mr. WALTER. This is not for the record.

(Off the record discussion.)

Mr. GWYNNE. It seems to me that the support for some of this legislation comes from the general public who are dealing with the very activities you propose to exempt, such as the OPA, the ODT, and these agencies which now touch everyone.

Mr. WALTER. With the cessation of hostilities whatever measures remain after the war can be covered.

Mr. McFARLAND. Now I might get to my last subject in these bills. I started out—I hope I am not burdening you by repetition—by saying that we have three divisions: Information, Operation, and Review.

On judicial review, I think these statutes and proposals would be very disappointing to most people. I personally have never thought the field of judicial review was the whole content of administrative law. Comparatively few people can reach that stage—

Mr. WALTER. Of course, Mr. McFarland, the possibility of review—

Mr. McFARLAND. I was just about to say that of course, it is necessary, because it stands there as a sentinel, you might say.

Mr. WALTER. And has a very salutary effect, you might say.

Mr. McFARLAND. But I still make this point, that review is just one part of this subject. If you had only a provision for review and no provision for administrative operation, you would have very little for the courts to review. No court could say a certain procedure should be had, if no statute or no constitutional provision says a certain procedure is required. Review does not provide procedure. We do need these other things if you are going to have a rounded system of administrative operation.

But any provision for review will be disappointing to many people. We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject

to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; but we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.

Mr. WALTER. You say "as it now is." Frankly, I do not know what it now is; and I do not know whether the rule as laid down in the Consolidated Edison case, is the law, or what the law is. I am not saying that because the Supreme Court apparently changes its mind daily, but what is the rule?

Mr. McFARLAND. Well, there are several different aspects of review. Most people think the substantial evidence rule is the only rule that is important. That is only one of the several aspects of the rule on review.

The CHAIRMAN. I am going to have to go directly and you are going to have to go directly, too, but could you indicate to the committee the judgment of you and your associates as to what would be reviewable by the courts under the provisions of this bill?

Mr. McFARLAND. What would be reviewed?

The CHAIRMAN. That is right; what would be reviewed. And it has been suggested that I add to my query the extent of review. For instance, here is an individual or business that has gone through the administrative mill and is dissatisfied with what has happened. He believes the determination in his matter was against the facts and against the law, and you have this record of the determination by the investigator and possibly some supplementary evidence. Now, when the court sits in judgment, is the court to be limited more than the courts ordinarily are limited when they are determining the facts of a disputed situation?

Maybe I could illustrate what I am talking about. A great deal of public complaint is that when people finally reach the courts the courts look around to see if there is any sort of evidence to support the determination of the agency and, if it does find some evidence to support the determination of the agency, the determination of the agency is upheld. A good many people believe the courts ought to consider the whole field and weight of the evidence in determining the question in controversy, if it is reviewable.

Now, how far toward the latter or how close to the former do we propose to go in this regard?

Mr. McFARLAND. I assume you are thinking of a situation in which the review takes place on the administrative record; that is, the agency has heard evidence, has heard witnesses, received the documents, and made up the record. The court's review is therefore confined to that record. There are other cases, of course, where the agency does not make a record and the court tries the thing *de novo*. We are not speaking of the latter.

The CHAIRMAN. Not at the moment; no.

Mr. McFARLAND. We are speaking of the case where the agency has made up the record.

The CHAIRMAN. Just there: Is it proposed to have the court make an examination to determine whether or not the record, the structure of the record and the action of the agency in making the record, is in itself a fair thing to the person who has to make the determination?

Mr. McFARLAND. It is. That is one of the categories of review, I think, in all these bills.

The CHAIRMAN. Then when you get into review, how does the court weigh the evidence in reference to the determination?

Mr. McFARLAND. I assume you are not asking me as to the mental processes of the court.

The CHAIRMAN. No, sir; I would not like to do that. I would not like to ask anybody to try to find the mental processes of some of our courts.

Mr. McFARLAND. The standard rule, of course, with respect to the review of administrative agencies is the review by the district court or the circuit court of appeals of whether or not there was substantial evidence to support what has been done.

Mr. WALTER. Now, there are two schools of thought. On the one hand, you have those who would permit a decision of an agency to stand where it is based on evidence, maybe evidence that is a mere scintilla of evidence; on the other hand, there are those who would have the decision given the same weight as is given that of an examiner in chancery.

Mr. CRAVENS. And the third——

Mr. WALTER. Oh, no; they are the two positions.

Mr. CRAVENS. There is the third position that we give the review court the right itself to weigh the evidence and reach an independent conclusion.

Mr. WALTER. That follows necessarily.

Mr. McFARLAND. The word "substantial" is a perfectly good word. If people do not give it its due weight, that is their fault. I do not think you can improve on that language.

The other rule that is so often discussed is the preponderance-of-evidence rule, or the weight-of-evidence rule. But the difficulty there is that it would cause about as much difficulty as help. Suppose you have the preponderance-of-evidence rule. As far as we can make out, that means weight of the evidence, the number of——

The CHAIRMAN. Not the number of witnesses.

Mr. McFARLAND. It does not mean the number in the narrow sense.

The CHAIRMAN. In Texas, where I used to practice, we always argued that way.

Mr. McFARLAND. I do not see what you can possibly gain.

The CHAIRMAN. Well, is not that the function of the court in examining with reference to the evidence; that is, to determine which way does the scale break when they weigh the evidence?

Mr. McFARLAND. To be sure, it is the function of the trial court to weigh the evidence, because it has to make the decision; but any reviewing court has a different problem.

Mr. GWYNNE. You could not substitute his opinion for the opinion of the first trial court.

Mr. McFARLAND. Naturally.

Mr. CRAVENS. I think what we are trying to find out is, in your judgment, based on your experience, is judicial review adequate which is

based upon a finding by the reviewing court that there was substantial evidence to support the facts as found by the agency below?

Mr. McFARLAND. That is right. That does not mean, as we sometimes hear it said, that they look only to certain pages of the record. You might have in the record something which would sustain the judgment; on the other hand, there might be incontrovertible evidence in the remainder of the record which utterly destroys it. The review must be of the whole record in the sense that any part of the record can be called upon.

Mr. WALTER. What do you think of the scope of review in H. R. 1206, at page 53 of the bill?

Mr. McFARLAND. I should say that reflected the present judicial rule. (At this point the bell rang for a call of the House.)

The CHAIRMAN. Mr. McFarland, you have made a wonderful presentation on the subject of administrative procedure, but if there is anything additional you could add to the statement you have made that would give additional information to the committee, we would be glad to have it.

Mr. McFARLAND. May I submit in writing an additional statement?

The CHAIRMAN. You certainly may; yes, sir; but, before we adjourn, do you feel there is something additional you ought to say at the moment?

Mr. McFARLAND. I do not.

The CHAIRMAN. It seems to us you have covered the field and have done a wonderful job.

(After informal discussion the committee adjourned until tomorrow, Friday, June 22, 1945, at 10:30 a. m.)



## ADMINISTRATIVE PROCEDURE

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MONDAY, JUNE 25, 1945

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D. C.*

The committee met at 10 a. m., Honorable Hatton W. Sumners (chairman) presiding.

The CHAIRMAN. The committee will be in order, please.

We have this morning, I believe, as the first witness, Dr. Splawn, of the Interstate Commerce Commission. Dr. Splawn, will you be good enough to favor us with your observation about this matter.

### STATEMENT OF WALTER M. W. SPLAWN, COMMISSIONER, INTERSTATE COMMERCE COMMISSION

Mr. SPLAWN. Mr. Chairman and gentlemen of the committee, I shall detain you only for a few moments.

My name is Walter M. W. Splawn. I am Chairman of the legislative committee of the Interstate Commerce Commission. On behalf of the Commission I express our deep appreciation that you have met this morning to hear the Commission and the representatives of the Practitioners' Association of the Commission.

We have in the Interstate Commerce Commission two committees interested in the subject matter of the bills which are now under consideration: The Legislative Committee and the Committee on Rules and Reports.

When you sent the bills down to the Commission the Chairman referred them to the Legislative Committee and we recognized that we had on our committee one member, Commissioner Mahaffie, who is also a member of the Committee on Rules and Reports, and by asking for the two senior commissioners, whom we would have asked for, for reasons that will be obvious, we expanded the Legislative Committee to include also the Committee on Rules and Reports. I will take just a moment to tell you who this expanded committee of five are.

The experience I have had in administrative procedure has been acquired as a member of the Railroad Commission of Texas, special counsel for the Committee on Interstate and Foreign Commerce, and as a member of the Interstate Commerce Commission.

Chairman John L. Rogers, member of the Legislative Committee, began his career in the Commission in the Bureau of Locomotive Inspection. He was later an examiner in the Bureau of Service; then executive assistant to the Federal Coordinator, and was the first Director of the Bureau of Motor Carriers, and as a member of the Commission he is the Commissioner through whom that Bureau reports to the Commission.

Commissioner Charles D. Mahaffie was, at one time, for a period of years, Solicitor of the Department of Interior; about 10 years he was the Director of the Bureau of Finance, which Bureau, as you know, aids particularly division 4. To that division is assigned the group of statutory regulations dealing with securities, directorates, the issuance of certificates of convenience and necessity to extend lines or permit the abandonment of lines, and various other allied statutes, all of which involves various procedures. As a member of the Commission for about 15 years, Commissioner Mahaffie, among his other duties, has been a member of the Committee on Rules and Reports; and the Commissioner in charge of the Bureau of Finance and the Bureau of Accounts.

Commissioner Claude R. Porter, one of the senior Commissioners, is a member of the Committee on Rules and Reports. At one time in his young manhood he was an Assistant Attorney General of the United States. For a period of years he was general counsel for the Federal Trade Commission where he assisted them in working out their procedures, and for almost 20 years has been a member of the Interstate Commerce Commission. He has, for a good part of that time, been on the Committee on Rules and Reports; the Commissioner in charge of the Bureau of Law and the Bureau of Inquiry, and has been interested in the matter dealt with in these bills.

Our senior Commissioner, Clyde B. Aitchison, was appointed to the Commission in 1917; he is perhaps the dean of all administrative officials in the Federal Government. Before he came to the Commission, some 28 years ago, he was solicitor for the Association of Railway Commissioners, and during that time the State commissions and the Interstate Commerce Commission were working together in administering the recent act to make an evaluation of the railroads of the United States.

Commissioner Aitchison, as solicitor for the State commissions, went through all of the conferences working out the procedures for the administration of that important statute. For seven and a half years before he was retained by the State commissioners he was a member of the State Commission of Oregon. As a member of the Interstate Commerce Commission he has handled every variety of the Commission's work, and is chairman of the Committee on Rules and Reports. For many years he has been most active in all matters pertaining to the organization of the Commission and the allocation of the work of the Commission. He has been a constant and constructive student of administrative procedure. He was a member of the Attorney General's committee to which reference was made here last Thursday, and the Attorney General made him a member of his subcommittee.

He is, by selection of the Judicial Conference, headed by the Chief Justice of the Supreme Court, assigned to a committee of that conference to study judicial reviews, and possible changes in the reviews provided under the Emergency Deficiency Act of 1913.

In the Seventy-seventh Congress, first session, when the Senate Committee on the Judiciary was considering their bills 674, 675 and 918, Commissioner Aitchison was the spokesman for the Commission, and during the time in which he analyzed those bills for the subcommittee he expressed what was then the hope of the Interstate Commerce

Commission that the bills might be amended so as to exclude the Interstate Commerce Commission. At that time he expressed on behalf of the Commission the thought that it should be excluded, but he also voiced our hope that if we were not excluded some possible amendment might be made under which we could work.

After further study and particularly the study of your revised and improved bill, H. R. 1203, we have reached the conclusion that we were correct in asking Commissioner Aitchison to voice our views in the Seventy-seventh Congress to request the exclusion of the Interstate Commerce Commission from whatever bills you may report, and to that end we have addressed to you a letter prepared by our legislative committee to which I have referred. A copy of this letter is already before the members of the committee, and at this time we respectfully request that the letter be incorporated in the record.

The CHAIRMAN. It will be incorporated in the record.

(The letter referred to follows:)

HON. HATTON W. SUMNERS,

JUNE 22, 1945.

*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, D. C.*

MY DEAR CHAIRMAN SUMNERS: Responsive to your request for comment on H. R. 1203, introduced by yourself, may I advise that this bill has been considered by the Legislative Committee of the Interstate Commerce Commission. Upon request of that Committee, the Commission added to its membership for the consideration of bills pertaining to administrative procedure our two senior Commissioners, Clyde B. Aitchison and Claude R. Porter. These two Commissioners with Commissioner Mahaffie also constitute the Commission's Committee on Rules and Reports. On behalf of the Legislative Committee the following comments are offered:

On the general question of the need of something in the nature of a code of procedure to govern the various agencies of the Federal Government which exercise administrative functions, we express no opinion. We assume that you seek from us an expression with respect to the probable effect of a measure of this kind on the work of this Commission in its administration of the Interstate Commerce Act and related statutes.

We respectfully request of your committee that the Interstate Commerce Commission be excepted from any bill such as this which your committee might see fit to report favorably. There is a precedent for such an exemption in the complete exclusion of the Commission from the Logan-Walter bill some years ago. Likewise, it will be recalled that the earlier administrative procedure proposals sponsored by the American Bar Association and its Administrative Law Committee excepted proceedings before this Commission. We reached this conclusion after careful consideration of H. R. 1203. The possible changes referred to yesterday during the course of the statement by Mr. Carl McFarland, as set forth in a committee print of S. 7 of May —, 1945, if adopted, would still make difficult the work of this Commission.

The Interstate Commerce Commission is the oldest of the administrative agencies of the Government. Throughout the 58 years of its existence it has given continuing study to its procedure, as a result of which it has devised and put into effect a number of procedural methods which are well understood and which have, we believe, the support of those who have dealings with this Commission.

The Commission is not merely a kind of court for the settlement of controversies between individuals or those to which the Government is a party. It is an administrative tribunal with the broader responsibility of carrying out the national transportation policy declared by Congress in the Transportation Act of 1940. It has numerous other duties under divers acts of Congress. In functioning it is called on to perform numerous and varied duties demanding widely different forms of administrative procedure, each suited to the nature of the particular circumstances. Some of these procedures have been used for many years, others are comparatively new, and some are yet in the experimental stage, but all have proved reasonably satisfactory, and their operation is understood by those who must use them. That this is so may be judged by the fact that the Commission's

General Rules of Practice adopted July 31, 1942, have been in effect for nearly 3 years since we promulgated them, having had the benefit of much consideration by our bar, and that no weakness has developed that required amendments. If the lawfulness of these procedural methods must now be judged by a code not designed simply to supplement the jurisdictional requirements of the Interstate Commerce Act, but to cover as a blanket all agencies of the Government having administrative powers, many of which differ substantially in nature and purpose from those committed to this Commission, inevitably there will be a long period of uncertainty and confusion while the effect and meaning of numerous statutory provisions susceptible of varying interpretation are being judicially ascertained. If there is anything in the bill which would better our practice, we would be swift to adopt it. But no one has made any such suggestion to us.

Throughout its history the Commission has striven to obtain the broadest and most accurate possible factual basis for its official acts, generally through the quasi-judicial device of a hearing and argument on issues of fact presented, even when by statute a hearing is not mandatory. Our experience has not indicated the need for a more elaborate body of rules to insure fairness. We see a danger in a code which would center attention on matters of form and detract from the important objective of reaching a sound conclusion on facts.

Our study of H. R. 1203 leads us to the conclusion that its enactment in either its original or revised form would have an adverse effect on the performance of our functions. In fact, it apparently would make impossible the performance of some of our important duties. Under the Interstate Commerce Act the Commission now has flexible powers "to conduct its proceedings under any provision of law in such manner as will best conduce to the proper dispatch of business and to the ends of justice." Section 17 (3). We regard this flexibility in procedure as of highest value in the public interest. A code of rigid requirements would forbid it.

A recital of the obscurities, ambiguities, and impractical requirements of this bill would make too long a letter. One feature, the scope of review in enforcement proceedings, seemingly would put the Commission back where it was in the impotent stage preceding the Hepburn Act of 1906. The review provisions run counter to the ideas which are being worked out by the judicial conference. We mention these as merely illustrative. We, therefore, earnestly request that the Interstate Commerce Commission be excluded from this bill.

Respectfully submitted.

[S] WALTER M. W. SPLAWN, *Chairman*,  
CLYDE B. AITCHISON,  
CLAUDE R. PORTER,  
CHARLES D. MAHAFFIE,  
JOHN L. ROGERS,  
*Legislative Committee.*

MR. SPLAWN. In that letter we asked to be excluded from whatever bill you may report.

Commissioner Aitchison, in presenting our views, will point out the long period of time you have given to the consideration of statutes providing for procedures for the Interstate Commerce Commission. For more than half a century the Congress has been continuously engaged, from time to time, in prescribing those procedures. We believe those statutes to be satisfactory when tested under the headings discussed here last Thursday: Public Information, Operation, and Court Review. We believe you have already attained, insofar as the Interstate Commerce Commission is concerned, the objectives announced last Thursday.

I do not believe you want to pass mere repetitive legislation, a sort of fifth wheel procedure. If that were the only result it would not be so bad, but as Commissioner Aitchison and Mr. Ames of the Practitioners' Association will point out, we believe the consequences are much more serious. Mr. Rosenbaum, representing a group of nonlawyer practitioners, also has a statement.

I know, and other members of the legislative committee know substantially what Commissioner Aitchison will say to you and may I advise that we are in agreement with the statement he is going to make.?

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Dr. Splawn.

Commissioner Aitchison, we will be glad to hear you.

#### STATEMENT OF CLYDE B. AITCHISON, COMMISSIONER, INTERSTATE COMMERCE COMMISSION

Mr. AITCHISON. Mr. Chairman and members of the committee, I should say that I have been more than identified by Dr. Splawn.

The CHAIRMAN. You are very well identified.

Mr. AITCHISON. As this statement has not been submitted to the Bureau of the Budget, the usual reservation is made that I do not know if it is consistent with the policies of the President.

Virtually seven bills are pending, as we understand H. R. 1203 has been tentatively revised. Their numbers are in the record.

Time has not been available, consistent with other duties, for me to study all of these as I should, nor, as we understood the chairman, does the committee wish now to go into the details of the bills. These details are of great importance as they affect the administration of the many laws as to which we function as an arm of Congress. Many of these details were discussed in my testimony before Senator Hatch's subcommittee of the Senate Committee on the Judiciary, Seventy-seventh Congress, first session, on S. 674, 675, and 918, pages 412-474, if the committee wishes to refer to that statement, made on behalf of the Commission of which I am a member.

The CHAIRMAN. What is the date of the statement, Mr. Aitchison?

Mr. AITCHISON. I believe it was April 29, 1941.

The CHAIRMAN. What was the purpose of the bills to which you refer?

Mr. AITCHISON. One, No. 675, was the so-called majority bill of the Attorney General's Committee on Administrative Procedure.

The Chairman. Yes.

Mr. AITCHISON. No. 674 bore the lower number, was the minority bill of that committee; and No. 918 was a mysterious bill. We never were able to find out who fathered it, although there was a suspicion; it was a matter of common repute.

The letter which Commissioner Splawn has mentioned specifically is directed to the chairman's bill, with the amendments which last Thursday we understood were suggested by the office of the Attorney General. Naturally I speak only for and of the Interstate Commerce Commission and its work, and I do not know how these bills would affect any other agency.

What often is lost sight of in discussing this subject as a generality is the great variety of matters which have been entrusted to the Commission. The Interstate Commerce Act itself is in four parts. The original act, passed in 1887, has been amended more than 40 times. Each of the four parts comprises many diverse functions. In addi-

tion to that act, the Interstate Commerce Commission has duties under many supplementary acts.

Let me call to mind some of these functions, all specific requirements of the Congress. The Elkins Act; joint Board action in connection with the Civil Aeronautics Board; audit of sums due certain carriers under the Transportation Act of 1920; coordinate and cooperative functions with the bankruptcy courts in reorganization or debt adjustment proceedings as to railroads; enforcement and implementations of certain provisions of the Clayton Act; fixation of boundaries of the standard time zones; approval of loans of certain kinds to be made by the Reconstruction Finance Corporation; formulation of regulations for the safe transportation of explosives and dangerous articles by common carriers; giving consent to reforms in parcel post zones, rates, etc., suggested by the Postmaster General; fixation of compensation to be paid railways, and urban and interurban electric railways, for carriage of the mails; construction and operation standards for railway vehicles to be observed by railroads; enforcement of the Safety Appliance, Power Brake, Ash Pan, Locomotive Inspection Acts and the block signal resolution; Hours of Service Act; and (under the regulations promulgated by the President), the Medals of Honor Act; and classifications of employees and subordinate officials under the Railway Labor Act and other acts.

All of these mentioned are completely outside the Interstate Commerce Act, and they each involve the making of rules or of adjudications, as I now understand those terms are meant, or both.

The CHAIRMAN. Do you operate under rules in each of those responsibilities to which you have referred, a set of rules that preceded the activity?

Mr. AITCHISON. I think so. I can answer that in more detail when I come to answer your Honor's question with respect to the matters which I expect to deal with.

The CHAIRMAN. Thank you.

Mr. AITCHISON. Within the Interstate Commerce Act there is an equal variety of functions, relating to many different types of transportation agencies and to their patrons; matters concerning the records of carriers; uniform accounting practices; depreciation charges; uniform bills of lading and livestock contracts; contents of annual and periodical reports of financial and operating statistics; issuance of certificates of public convenience and necessity or permits for construction, extension or operation by rail, highway, or water, or common or contract carriers, or brokers, or as a freight forwarder; proceedings for abandonment of line or operation; control of numerous types of financial matters—consolidations, mergers, leases, acquisitions or control and transfer of operating rights; interlocking directorates, approvals of stock and bond issues; approval of the insurance offered by motor common carriers; forms of traffic, and relief from the rules governing them; credit to shippers; the long-and-short-haul clause; valuation of carrier property; safety regulations for motor vehicles and their operators; emergency service orders as to railroads, motor carriers, and water lines; car service rules; these are all subjects which are within the act itself; they involve rule making or adjudications, or both, and they are additional to the general powers of the Commission with respect to rates. And by no manner of means is this a complete list, or even an adequate summarization of the functions.

With respect to a great many of these diverse functions, Congress has specifically laid down a form of procedure which it considered to be adequate and adapted to the type of function. As these functions are different, the procedures which control them are quite naturally and necessarily different, and they must be different if administration is to be efficient and fair. To the extent that it is possible to subject these all to a general procedural rule, we believe this has been done by the Commission's general rules of practice, and we do not know how we can go further. We think the rules are adequate and satisfactory.

The CHAIRMAN. May I ask if there is any difference in these rules as they apply to the various subheads of your responsibility?

Mr. AITCHISON. Oh, yes.

The CHAIRMAN. They affect the right of appeal to courts?

Mr. AITCHISON. The right of appeal to the courts is provided by the Urgent Deficiencies Act of 1913, sometimes referred to as the District Court Jurisdiction Act, and there have been many decisions by the Supreme Court with respect to various types of orders, growing out of that act.

The CHAIRMAN. My question is has there been any variation in the right of appeal on the part of the aggrieved person who is affected by these different activities which you mention?

Mr. AITCHISON. Yes. I think I can answer that best by saying that in a number of cases the Supreme Court has said the nature of the subject matter is such that the order is not really reviewable at all, as you find in the fixation of compensation to be paid for the transportation of the mail, as my friend Mr. Miller no doubt remembers, in the case of *United States v. Griffin* (303 U. S. 206). That is perfectly sensible; there should not be any review, because if it goes to the Court of Claims the matter is tried there and it is not upon review of the Commission's order.

Mr. WALTER. Suppose the matter is arbitrarily or capriciously handled, should there not be a review allowed first?

The CHAIRMAN. What Mr. Walter is driving at is this: Should not the matter be inquired into before damage is sustained about which the matter is taken to the Court of Claims?

Mr. AITCHISON. If the matter is arbitrarily handled or capriciously handled, there is a deprivation of constitutional rights, and of course the complainant would not recover in the Court of Claims.

Mr. WALTER. Suppose a damage has been suffered before?

Mr. AITCHISON. The damage would be good only if there is a review.

Mr. WALTER. If the appeal was a supersedeas.

Mr. AITCHISON. But the determination of the Commission, in the case I have mentioned, is retroactive; it goes back to the time of the filing of the petition.

Mr. WALTER. We understand that, but still damage has been sustained and the only redress then comes through the prosecution of a suit in the Court of Claims.

Mr. AITCHISON. May I say, Mr. Walter, as far as I am concerned I do not believe that it makes one bit of difference whether review comes then or following the presentation by the carrier against United States for compensation for carriage of the mail.

Mr. WALTER. If it does not make any difference then why are you objecting to it?

Mr. AITCHISON. I am not objecting. I say with regard to that it is only a question as to how far the Congress wants to make the Urgent Deficiencies Act go. The Urgent Deficiencies Act speaks of any orders of the Commission, but Justice Brandeis pointed out that an order of that character is not reviewable in the absence of a congressional declaration, as are other orders which are of the character such as I mentioned.

Another is the fixation of the status of employees of a railroad, to inquire whether or not for the purposes of the Railway Labor Act, on the one hand, or the Social Security Act on the other, an electric interurban common carrier falls within the exception of the Railway Labor Act. Now, the Congress has left it to us to make that determination. It could have left it to somebody else.

The CHAIRMAN. The notion is that if it was left to the court, with respect to the making of such orders the court would be making railroad rates?

Mr. AITCHISON. There would be a great deal of difficulty about it. We function both in a legislative and in a judicial capacity in the treatment of these rates, and very often in just a few moments. As I say, we think the rules are adequate and satisfactory. We know of no additional general procedural regulations which could be adopted for the benefit of our practice, covering all of these diverse functions. If any should be brought to our attention we will change our rules very quickly so as to incorporate them.

The CHAIRMAN. Do you have any semipublic hearings with reference to these rules?

Mr. AITCHISON. Yes; I shall go into detail with reference to that.

The CHAIRMAN. I do not want to interrupt your presentation.

Mr. AITCHISON. I shall go into that in detail.

Mr. WALTER. May I ask you a question at this time: Several years ago when the subject matter of this type of legislation was under consideration, Mr. Gwynne and I looked at these rules and we had an idea if the amendment were adopted that we followed pretty closely your procedure.

Mr. AITCHISON. I think it is much of the same type.

Mr. WALTER. And if we are following very closely the procedure as it applies to the Interstate Commerce Commission why are you objecting to the legislation?

Mr. AITCHISON. I am not objecting to the legislation; our feeling is, as Commissioner Splawn has already stated with respect to the Interstate Commerce Commission, that the subject has already been anticipated by the Congress and that these bills which you have before you have provisions in them which will make our work much more difficult, and will not facilitate it at all.

Mr. WALTER. We had an idea that we were flattering you.

The CHAIRMAN. Making it applicable to all of these other people and I suppose you had the notion that you did not want to exclude the pacemaker.

Mr. AITCHISON. Well, I simply can say that careful study of the bill prepared by the American Bar Association does not persuade us that it contains a single new feature which could help by being added to the general rules of practice.



Mr. GWYNNE. In that connection, H. R. 1203, as I understand the purpose, is to lay down certain minimum requirements of procedure.

Mr. AITCHISON. Yes.

Mr. GWYNNE. And if you meet those minimum requirements already how are you injured?

Mr. AITCHISON. We do not meet the general requirements in their entirety and we could not, and that is what I want to deal with before I get through.

The CHAIRMAN. May I suggest, Mr. Aitchison, that you take up that matter now. The questions of the members indicate what is troubling our minds and if you can get quickly to the matter that is causing difficulty to the committee it would be very helpful.

Mr. WALTER. I think one question might clarify the whole situation if I may be permitted to ask it: Do you object to the elimination of your present practice of conferring with the examiner before he makes a report?

Mr. AITCHISON. We do not do that.

Mr. WALTER. You do not do that?

Mr. AITCHISON. No. But the bill goes a whole lot further than that, Mr. Walter.

Mr. WALTER. Yes.

Mr. AITCHISON. That is not the thing that is bothering us at all.

Many features of the American Bar Association bill are distinctly inapplicable, as we regard them, and some would definitely impede our work.

I would like to say this, with reference to the general approach of the bill. Congressman Walter had indicated that in earlier legislation they were copying as much as possible the Interstate Commerce Commission's procedure, for which I am humbly grateful, and yet with all due respect I want to say a couple of things about the general approach of the Bar Association's bill. I can be frank, I think, because I have been a member of that association for 20 years. I think quite probably and naturally the draftsman was thinking of rate controversies, or fights over certificates of convenience and necessity or grandfather rights, or possibly he had other agencies of the Government chiefly in mind, and he drafted his bill on the theory that the administrative functions to be dealt with are controversies between the agency and private people, or controversies between private people. Not minimizing the fact that there is often plenty of controversy, the basic theory of the whole Interstate Commerce Act is that the main function of the Commission is one of investigation—a search for facts, in order that the proper standard of Congress then may be applied.

The CHAIRMAN. But you act on the findings of the Examiner.

Mr. AITCHISON. Yes. That is merely one part of my discussion.

The CHAIRMAN. A determination must be made upon findings; the findings are used as a basis of your determination.

Mr. AITCHISON. But I want to point out, Mr. Chairman, that last Thursday we were told when we investigated we pointed our finger at a person and said, "You have sinned," or "You are guilty."

The CHAIRMAN. Well, we do not pay any attention to those things.

Mr. AITCHISON. The whole theory of the bill that is drawn by the American Bar Association is—

The CHAIRMAN (interposing). Mr. Aitchison, if you will permit an interruption, we hope to hear the subject matter discussed. The matter has been considered by Mr. Gwynne and Mr. Walter, and they have introduced bills and they know much more about it than the chairman, whose name is attached to the particular bill. We are just trying to find out what should be done about the subject matter.

Mr. AITCHISON. Without going into all the details, Mr. Chairman, I would like permission to have the reporter, if he will, copy into the record a few references with respect to which we do adjudicate controversies after having been investigated with reference to the public interest, and, if I may, I ask permission to have that copied.

The CHAIRMAN. Yes; we will be glad to have you do that.

Mr. AITCHISON. I even have a reference to the statute that goes to the matter of payment of our expenses.

(The matter above referred to is as follows:)

I quote (the references are to U. S. C., title 49):

"Section 13. (1) That any person \* \* \* complaining of done or omitted to be done \* \* \* in contravention of the provisions [of this pt. I of the act] may apply to said Commission by petition, \* \* \*. [Then follow provisions for service of the complaint with directions to satisfy or answer.] If such carrier \* \* \* shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"(2) Said Commission shall, in like manner \* \* \* investigate any complaint forwarded by the railroad commissioner \* \* \* of any State, \* \* \* and the \* \* \* Commission shall have full authority at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made \* \* \* or concerning which any question may arise \* \* \* or relating to the enforcement of any of the provisions of this part. \* \* \*"

The same language—"investigation"—is used in section 13 (3) and (4), when State rates are concerned; section 15 (1), which authorizes orders by the Commission; section 4 (1), relief from the long-and-short-haul provisions of the act "in special cases, after investigation"; section 19a, valuation of carrier properties.

To show how all pervasive is this concept, I find that it appears even in making provision for allowance and payment of "necessary expenses for the transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington \* \* \*" (sec. 18 (2)).

These are all from part I of the act. Corresponding language appears throughout, in the other parts of the act. This has been the traditional point of view of Congress from the beginning of the act, in 1887, and it is the view of its functions which the Commission holds. It has to be that way, for proceedings before the Commission are not matters of private litigation, but of public concern. (*A. J. Phillips Co. v. Grand Trunk, etc., R. Co.*, 236 U. S. 662; *Pennsylvania R. Co. v. Stineman, etc.*, 242 U. S. 298). And the Commission represents the public (*Sacramento Merchants Association case*, 242 U. S. 178, 188) which can never be defaulted by a procedural lapse by a private person or even by his lameness of presentation, let alone by his agreements (*Procter & Gamble case*, 225 U. S. 282). Congress and the Supreme Court have emphasized this over-all view by the importance which now attaches to the national transportation policy declared by Congress, in the light of which all the provisions of the Interstate Commerce Act are to be administered. I repudiate absolutely for my agency the suggestion that "investigation" is "accusatory action."

The CHAIRMAN. Does this bill or do any of these bills hamper you in the discharge of your duty as an investigator?

Mr. AITCHISON. Yes; because they say anybody who investigates shall not perform other functions.

The CHAIRMAN. Won't you come to that point of how they hamper you?

Mr. AITCHISON. Why, it would take the entire Commission in. That is our whole job—to investigate.

The CHAIRMAN. We understand that.

Mr. AITCHISON. We are all ruled out, therefore. The only way we could act would be to make ourselves counsel and get on the other side of the table—

The CHAIRMAN. You mean this proposed legislation would create some board of investigators other than those you select?

Mr. AITCHISON. No, not that; but the language of the bill is drawn with the intent of excluding investigating functions entirely from the functions of adjudication.

Mr. WALTER. That is because some of us dislike having one person be prosecutor, judge, and jury.

Mr. AITCHISON. Quite right, and we do not want to be prosecutor, judge, and jury, and we think under the Interstate Commerce Act our duty, as specified over and over again—no less than seven times, I think, in the last act you passed, the Freight Forwarders Act—to investigate matters that are brought to our attention carries with it the duty to do so with an open mind. And that is the way we approach these subjects. For my agency, I want to repudiate the idea that on an investigation which the law requires us to make we are prejudges or prosecutors; we are inquirers.

The CHAIRMAN. I think everybody appreciates the high type of service rendered generally by your Commission, Mr. Aitchison. We are trying to find out what we are to do here with our job.

Mr. AITCHISON. Passing that, then, my second observation is directly connected with the last statement, the one we have just been discussing.

First, the whole tenor of H. R. 1203 is negative; it is restrictive as to what the agency must do and what it shall not do. It is a retrograde step from the theory that has applied generally in the Interstate Commerce Act, which has favored flexibility of procedure in the sound discretion of the agency of Congress in which responsibility has been lodged. And remember we take pride in the fact we are an arm of Congress. With the exception of two lines, 12 and 13 on page 18, which are absolutely unnecessary because the law implies them anyway, there is nothing in the bill even hinting at facilitating the work of the administrative agency. I should also except the somewhat indirectly expressed authorization of the agency to delegate the power of initial decision to subordinates. This I should prefer to see expressed directly and not inferentially. But even this leaves in doubt the question whether the relatively recently adopted similar provisions of section 17 of the Interstate Commerce Act will be repealed by necessary implication, for they cover the same subject in a different way and provide what may be delegated, to whom, how the delegates shall act, and how their acts shall be reviewed, and it is a different procedure from what is contemplated by H. R. 1203.

The CHAIRMAN. When your investigators conduct an investigation and come to make a report, do they receive any assistance or direction from any other person or any other part of your organization with reference to the type of report they should make?

Mr. AITCHISON. Now, you might just substitute me for "investigator." That is what I do. When I go out to hear a case, I investigate. I have tried many cases. I investigate the facts, and do not think I am beyond the bounds of the regulatory powers of the Commission, at all. It is my job to go out and get the facts. As I told one young gentleman who objected to my questioning, I told him the story of Judge William Gaslin, of Nebraska, who set aside a verdict of a jury for a loan shark who had a quitclaim deed when, in reality, it was a mortgage. He set that aside and said, "It takes 13 men to steal a man's farm in this court."

The CHAIRMAN. I do not know from that just what the answer is to my question.

Mr. AITCHISON. I do not myself take directions from anybody.

The CHAIRMAN. That was not quite my question.

Mr. AITCHISON. Nor does our examiner when he writes a report.

The CHAIRMAN. Why should anybody be directing him as to what sort of a report he should make?

Mr. AITCHISON. They do not. But this bill would prohibit him from talking the subject over at all in the same general way that judges do when they come into a lawyer's office on a hot Saturday afternoon in the summertime and say "I have a case that is bothering me," not telling what it is, and discuss the general subject.

The CHAIRMAN. Maybe I do not have the picture well in my mind, but I thought these investigators who went out for your organization performed a service somewhat similar to that performed by a master in chancery, who goes out and investigates the facts and submits for the guidance of his principal some finding of facts and probably of law, and then the principal takes that and determines from that what ought to be his judgment.

Mr. AITCHISON. When a report is made, then, of course, there is opportunity for the parties to file exceptions to it and those exceptions are heard before the agency itself.

The CHAIRMAN. Dealing, however, with the making of the report and what transpired before this report was filed.

Mr. AITCHISON. May I perhaps illustrate by a recent experience of of my own which would be forbidden, by the way, by this bill. I heard the case involving the rates on coal from certain areas to Youngstown, Ohio, a very important case because it was claimed it was a key rate. I had assisting me an examiner of the Commission. The case was on my docket and I presided, and at the end of the submission of the facts I stated that the proposed report would be prepared by the examiner who sat with me, and he would prepare exactly the sort of report he wanted to prepare and would do it without consultation with me and on his own responsibility, because I wanted to keep my mind open until I had had the benefit of the examiner writing up the facts, telling what conclusions he thought ought to be drawn, letting the parties except, and letting the matter be argued before the Commission, as it finally was. I wanted to keep my mind open.

The CHAIRMAN. Is that the practice?

Mr. AITCHISON. That was satisfactory to all concerned and was done.

The CHAIRMAN. You, see, that is what people who have matters pending before these various agencies seem to want to have done, and we have had a good deal of complaint, whether justified as founded on

facts or not, that these examiners are not free to make an independent report, but they have a good deal of "coaching" from their superiors; they feel they would get into a lot of trouble if they did not report like their boss wanted them to.

Mr. AITCHISON. I can only speak with respect to my agency, and with respect to my agency I quote from the witness stand Mr. Dean Acheson's testimony before the Senate committee, in which he went into this very question Your Honor is addressing himself to, and said the examiner of the Commission was entirely free, if he wanted, and there would be no reprisals, to put out a report holding that the Commission was an unconstitutional body. They have many times suggested that decisions of the Commission in the past should be reversed.

The CHAIRMAN. Then if we should have legislation which would require that sort of procedure, it would not handicap any agency to act under it?

Mr. AITCHISON. It would not, only that the law goes further and says because I sat in that case up in Pittsburgh trying to find out something first hand in respect to the facts, I ultimately had to assume the responsibility, and I and I alone, unaided by anybody else, had to draw the report in that case. That is too much.

The CHAIRMAN. You mean you were sitting as a commissioner?

Mr. AITCHISON. That, sitting as a Commissioner, I would be a subordinate official under this act.

Mr. GWYNNE. In connection with that very case, you were sitting as a judge if you were going to make the decision, but did you have to go and round up evidence and present the case?

Mr. AITCHISON. No.

Mr. GWYNNE. Do not you have people to do that sort of thing?

Mr. AITCHISON. I did not need to in that sort of case; because, when we get a hot coal case, they all see that the facts get before you.

Mr. GWYNNE. Of course, a judge sitting in an equity case for an injunction is really conducting an investigation, is he not?

Mr. AITCHISON. Certainly.

Mr. GWYNNE. Except that someone represents one side and someone represents the other side, and finally the judge decides what the result should be through his investigation. Cannot you do that in your organization—receive the facts from one side and leave the other party to bring the facts on the other side, and you decide it?

Mr. AITCHISON. Oh, yes. But is the public interest to be defaulted because of the lameness of the presentation? I do not think it ought to be before the ICC.

Mr. GWYNNE. Right there—

Mr. AITCHISON. Now, wait a minute. When we discover, in one way or another, when in cold blood we sit down and study this record, or the examiner studies the record as he did in this Pittsburgh case, and see that by inadvertence, a material fact has been omitted, and that the parties had not addressed themselves to it, we try to get the facts complete in the record. The examiner in that case brought the matter to my attention, and I caused a letter to be written to each party and asked them to endeavor to stipulate with respect to that fact. If they cannot stipulate with respect to the fact, the case may be reopened and they will be heard on it. But it was our responsibility to get all of the facts.

The CHAIRMAN. Surely. That is a commendable thing to do. Would there be anything in this proposed legislation that would prevent that procedure?

Mr. AITCHISON. There would.

Mr. WALTER. Where?

Mr. AITCHISON. In that case, the examiner would not have been permitted to have gone to the documents where he found all that out.

The CHAIRMAN. Where is that, because I would not want anything that has my name attached to it to have that result?

Mr. AITCHISON. Because it was a matter of the exact mileage from one particular district to another district where a given rate was in effect, and the question was largely one of rate comparisons.

Mr. WALTER. Just point to the section in these several bills that would make impossible the thing you have done.

The CHAIRMAN. And, if you can do that, that is helpful. I want you to know the questions I am asking are not asked in any antagonistic attitude at all. I am trying to develop the facts that I do not know about from the people who do know.

Mr. HANCOCK. I think it is page 7, line 13, subsection (c).

Mr. AITCHISON. There are two places in there that will have to be brought together; section 5 (b) on page 7—

Mr. GWYNNE. No; section (c).

Mr. AITCHISON (reading) :

The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8 \* \* \*

That would have forced me to have written the report in that case, although it was eminently better that I keep my mind open and let the examiner, a thoroughly competent man, study the record and give the parties something to shoot at.

Mr. SPRINGER. Is there any provision in any of the bills, other than the one to which you are now referring, that relates to this same subject?

Mr. AITCHISON. Yes; what I call the more monastic segregation provision. I think I will come to that.

Mr. WALTER. Is it a usual practice for a commissioner to conduct investigations?

Mr. AITCHISON. In many of them we do—as many as we can. We should conduct more, if possible. And, Congressman Walter, in that same connection, while we are talking about this examiner, he happens to be in the room here, and he is the assistant to Commissioner Splawn on the legislative committee, and he also is assistant to Division 1 with respect to administrative matters. He keeps thoroughly posted on matters of this sort and as I interpret this bill he would be forbidden to perform those duties.

Mr. SPRINGER. Do I understand that you, as one of the Commissioners, go out and interview witnesses, prepare the case, and so forth?

Mr. AITCHISON. No.

Mr. SPRINGER. How far do you go in that respect?

Mr. AITCHISON. I go out and hear what the parties have to say.

Mr. SPRINGER. But do you participate in collecting the evidence or getting it ready for presentation?

Mr. AITCHISON. Most assuredly. Of course, in valuation cases we do the whole thing, and the statute uses exactly the same language

with respect to valuation as it does with respect to hearing complaints. The difference, of course, is that normally the pros and cons can be developed in the particular kind of thing that the people who drafted this bill had in mind—can be developed by an adversary proceeding. But when you come to draw one act, and take into consideration matters such as evaluation, safety appliances, and the like, you are doing more than I would like to try to do.

The separation of functions is on page 8.

Mr. FEIGHAN. To what bill are you referring?

Mr. AITCHISON. H. R. 1203.

Mr. FEIGHAN. At page 7.

Mr. AITCHISON. If you will indulge me, I will endeavor, before I finish, to get to that. I think I have that a little later here; if not, I will find it before I leave the room. But clearly the minority of the Attorney General's Committee, in its bill 674, had definitely in mind when a man heard a case he was to take that record and that record alone and talk to nobody. Of course, he should not talk to the parties. If they come in and try to talk to me, they go out of my office in a hurry. But the intent of the bill is that he should not even talk to the people around the building; he should not consult our chief counsel with respect to a question of law; he should not consult the Director of the Bureau of Traffic, or one of our tariff experts with respect to an interpretation of a tariff, or how to find his way around one of those thick documents, and the like.

Mr. CHELF. They should not do it, but do they do it is the question.

Mr. AITCHISON. We have the word of Mr. Dean Acheson, [p. 818, his testimony] which fortifies mine that they do, and that was after a very long examination made by the Attorney General's Committee.

I do not understand that there is any claim with respect to ICC examiners having gotten illicit information. What good would it do them? They have to put it in the report and that report is only a proposed report and the parties can except to it. And if he has gone outside the record or has said anything that is not substantiated by the record, they can point to it and have a chance to argue, both in writing and orally. And if a division, even, goes off wrong on that, they have a right to ask for a review by the entire Commission with respect to it.

Mr. WALTER. This whole question was very thoroughly discussed by yourself in conference with the Attorney General's committee when it made its inquiry some time ago, and I was under the impression that H. R. 1206, which is the recommendation of the minority of that committee, adequately dealt with this very thing.

Mr. AITCHISON. I feel, Congressman, I would not be doing myself or yourself, as author of that bill, justice if I attempted to discuss the details of the bill; because, frankly, since I was told I was expected to appear before the committee, I have not had an opportunity to study these bills as I should.

I understand in general that H. R. 1206 is similar to S. 674.

Mr. WALTER. Yes; it is.

Mr. AITCHISON. To the extent it is similar, I can simply refer you to the testimony which I gave before Senator Aiken's committee, and the statement filed on behalf of the Commission.

Mr. GWYNNE. This provision about the separation of functions simply restates the law which the courts have been following for 1,000

years, does it not? In other words, the courts have been functioning under that program of prosecution being separate from decision. Do I understand you cannot function under that?

Mr. AITCHISON. What I am calling attention to is the fact that the word "investigate" is a word which in the Interstate Commerce Act is used probably 30 times as comprehending the whole scope of the duties of the Commission under the act, and I do not think the draftsman means to have in mind the same meaning for it; he means probably the prosecuting functions. And if you go into the prosecuting functions, I can have no objection. But with respect to "investigate", when the law casts on every one of us and on every man we send out as our delegate the duty of making an investigation under the act, I just do not see how that will work there.

Mr. WALTER. May I call your attention to the language which I understood was drawn as a result of the statement you made at the Attorney General's Committee hearing on page 34 of H. R. 1206 where it is provided:

Those heads, members, officers, employees, or representatives of any agency engaged in presiding at hearings or formulating findings and decisions in the course of formal proceedings shall not consult or advise with agency, counsel, investigators, representatives, or employees except upon notice to all affected parties and in open hearing or otherwise as provided herein.

Now, what can hamper the functions of your agency if that language is written into law?

Mr. AITCHISON. In the first place, I think there is a little mispunctuation there that ought to be straightened out. I suppose what is intended is "agency counsel."

Mr. WALTER. Yes.

Mr. AITCHISON. But passing that and taking out the comma, does that mean I cannot call in our chief counsel and ask him what his general view of the law is?

Mr. WALTER. No, sir; it does not mean that. You have a perfect right to do that.

Mr. AITCHISON. He is the agency counsel.

Mr. WALTER. You have a perfect right to do it after you tell the other side you are going to sit down and make inquiries.

Mr. AITCHISON. And "employees": When the parties have cited a mass of tariffs, that I have to be omniscient enough to read through them all, to go into the file myself and find them, or can I ask his advice to dig up rates for me?

Mr. WALTER. You can do that under this language.

Mr. AITCHISON. By asking everybody to come in?

Mr. WALTER. No; by telling them you are going to have a hearing on a certain day for the purpose of inquiring into whatever it is. And I doubt very much if everybody who is notified or anybody who is notified would appear; still they would have a right.

The CHAIRMAN. Mr. Aitchison, your notion is that in the performance of your duties you are an agent of the Congress and in ascertaining facts the nature of the job is such that you cannot proceed too much as a court; you have to be less formal than a court.

Mr. AITCHISON. I think we must be less formal than a court.

The CHAIRMAN. And you have to have freedom of action and liberty of judgment as to where you get the facts when you need them to supplement your own information?



Mr. AITCHISON. That has been the settled principle since the act to regulate commerce was enacted in 1887.

The CHAIRMAN. -What this committee is trying to do, and it is a hard job—it does not want to handicap any agency, of course, but there is a good deal of complaint that in these inquisitorial agencies—and yours is largely of that sort; you do that which amounts to a rendition of judgment resulting in shifts of ownership, or infringement of interest and right—that those people who ascertain the facts ought to make the reports and ought to make reports that are matters of record and those reports ought not to be made at the suggestion, directly or indirectly, to any degree of those who finally have to sit in judgment to determine what ought to be done under the report.

That is the complaint that comes to us, that in these agencies too frequently those who are to act as judge influence the type of report that goes into the record.

We are right at the point now, as I understand from those gentlemen who are more familiar than I am with the matters in controversy, that gives us the trouble and where you can render us the most assistance.

Mr. WALTER. Mr. Aitchison, as I understand it, in each of these inquiries the decision affects only the parties to that particular proceeding?

Mr. AITCHISON. No; they affect the whole public.

Mr. WALTER. But if the same question or a similar question arises in another case, is not there another hearing, or are you bound by precedent?

Mr. AITCHISON. No; they are not.

Mr. WALTER. Are you bound by precedent, having decided the issue in A, B, and C, that that is the law with respect to D, E, and F?

Mr. AITCHISON. When we recently had *Ex parte 148*, an application of all the railroads and the motor carriers of the country for a 10 percent increase in rates, we had certain applicants who were participants, but it affected everybody in the country whether he was there or not, and we represented the public. The Supreme Court said so; they told us that is our duty in the Sacramento case with respect to the long-and-short-haul clause.

Coming to this question about the man who hears and the writing of the report, this is my observation on that: In the first place, I do not believe that before the Commission they have exactly the situation which has given trouble with respect to some of the other agencies. I am speaking from hearsay, of course; but to a most considerable extent what comes before us is statistical and documentary testimony. Oftentimes it is reduced to writing, submitted to the opposing parties in advance of the hearing; frequently it goes in without a single line being read out loud, even, and the question being asked "You prepared this statement?" "Yes." "Is there objection to this being copied in the record?" "None at all, Your Honor." "The reporter will copy it in."

Now, what is sacred about the man who sits in the chair making the decision in a case of that sort when the record is made up that way?

Again I want to ask a very practical question. You take one of these great rate cases, such as that, not little cases, but in one of

those cases where they have 500 counsel appearing and where they have 1,000 witnesses, and where 1,000 other witnesses take advantage of the rule of procedure we announced and have submitted verified statements in lieu of personal appearance, cross-examination being waived, when it is necessary in short order, because perhaps \$2,000,000 a day is involved, for us to cover the entire country, and when we have several simultaneous hearings going on, by everybody's consent, as the only practical thing to do—and not alone with their consent, but approval—a hearing going on on the Pacific coast, on the Atlantic coast, and in the South, and four of them in some central place, and then we adjourn to other places, covering the entire country in a short time: Who is the officer who hears those cases; what officer is going to write the report?

The CHAIRMAN. Now, what does happen with that report, and so forth? Does that simply come in and then the Commission has to take it up?

Mr. AITCHISON. In a case of that sort, in the last one we had, Commissioners Mahaffie, Splawn, and myself were the committee—

Mr. WALTER. Before you go into that, may I answer the question you asked?

Mr. AITCHISON. Yes.

Mr. WALTER. The report would be written up by the four, five, or six examiners, each dealing with the particular phase of inquiry he is acquainted with.

Mr. AITCHISON. The probabilities are the only acquaintance he got was a one-sided one by hearing certain witnesses who say something in the testimony, and not hearing the other side of it. The other side will probably be going on before another examiner, and necessarily so. We do not clean these things up—

Mr. WALTER. The answer to your question is very simple, as I see it. Certainly there would be a conference between all of the examiners; if one man heard one side of the question and another man the other, obviously the two men who heard both sides would sit down together and write their recommendations.

Mr. AITCHISON. I am afraid that is forbidden.

Mr. WALTER. Just point out where that is forbidden.

Mr. AITCHISON. Because they are forbidden to confer with each other.

Mr. WALTER. Oh, no.

Mr. AITCHISON. They—

shall not consult or advise with agency counsel, investigators, representatives, or employees except upon notice to all affected parties.

Mr. WALTER. That is right.

Mr. AITCHISON. When they come to drafting the proposed report, to which parties are going to be entitled to file exceptions, or when it is an emergency matter of this sort as the Commission itself has to accept the responsibility of making the initial decision, like that big rate case I talked about, do they have to call people in to sit down and have 500 people before them, helping them to write the report?

The CHAIRMAN. What you do in that case, Mr. Aitchison, you take the reports which have been made to you, as you said, each of the investigators perhaps covering some phase of the matter, and they come to you and are considered by you in their consolidated form?

Mr. AITCHISON. That came to the committee constituted by Commissioner Splawn, Mahaffie, and myself, and together we prepared the draft of report which was submitted to the Commission. But, before that, the entire Commission had heard argument on that.

The CHAIRMAN. Would the entire Commission hear argument on it before they had the consolidated facts before them?

Mr. AITCHISON. Before they had the report?

The CHAIRMAN. Yes.

Mr. AITCHISON. That gives me a good opportunity to say what I think is the thing that has given a great deal of concern to our practitioners, and so on.

In cases of that kind that we handle, it is oftentimes quite a good thing in the public interest to let people tell their story and get it off their chest and let it be understood, whether or not it would comply with the strict rules of evidence; and we do get lots of that kind of thing in.

The CHAIRMAN. In that sort of situation, you take the argument and the facts presented in the course of argument and consider them together with the reports made to you by the various examiners, and base your conclusions upon all of those?

Mr. AITCHISON. Yes. What the record is is really an armory of facts, and when they come to the presentation before the division, or before the Commission as a whole, the parties draw out of that armory the facts they want to use, and they do that either in their briefs or oral presentations.

The CHAIRMAN. When that matter then reaches the court, what constitutes the facts that are considered by that court? I am afraid I have a rather involved question, because the situation seems to me rather involved.

Mr. AITCHISON. Under the Urgent Deficiencies Act, you mean?

The CHAIRMAN. I do not know—

Mr. AITCHISON. That is the one which governs the majority of our cases.

The CHAIRMAN. I think I will stand on that question. Under any act, when you get to the court, what would the court consider with reference to the finding of facts?

Mr. AITCHISON. The court in the case of the Urgent Deficiencies Act does not go into the facts unless the party moving for a review puts the entire record before the court. And then the court examines for the purpose of seeing whether the well known standards have been met; otherwise it does not go into the facts.

Now, with respect to other classes of cases where there is no record, there obviously we have quite a different situation and there seems to be a line of authority that in a case of that sort the court can take testimony *de novo*, to inquire whether the order of the Commission was a reasonable one.

The CHAIRMAN. Is that in a case where there is no record?

Mr. AITCHISON. Yes; and there are many, of course, that have to be. For instance, all of these emergency orders that are made from day to day, they are made out of the air from our general knowledge of the transportation situation. They have to be.

The CHAIRMAN. On that particular point, would you have any difficulty in operating under the provisions of this proposed legislation?

Mr. AITCHISON. With respect to judicial review?

The CHAIRMAN. No, sir; with respect to the applicability of the general provisions in this proposed legislation?

Mr. AITCHISON. I am not wholly certain whether they have gotten this out or not, but there is a rather curious thing. I notice, I believe, that in one of the sections of H. R. 1203 certain acts are entirely exempted; that is, wartime acts and acts which do not go beyond a given date in 1947.

The CHAIRMAN. My question was do you think that the making of those emergency determinations dealing with emergency situations would be either prohibited or the agency would be handicapped in doing its work if it feels it is necessary to do it quickly and based on your judgment as to what you do upon your general knowledge, as you have heretofore indicated?

Mr. AITCHISON. It certainly would in these great rate cases I have mentioned.

Mr. WALTER. Well, those decisions that are made without a hearing are in the nature of preliminary decisions, are they not?

Mr. AITCHISON. No; they are final. When you tell a carrier to put on an embargo at a given point, and not move anything in there, that stops movements instantly; or if you have a flood and they tell the carrier to disregard the shippers' routing instructions. They could complain about such an order. But we have collected more than a quarter of a million dollars in fines for violations of them. Three cases went to the Supreme Court—one, the P. Koenig Coal case, the other the Avent case, and the Michigan Portland Cement case.

Mr. WALTER. Do you have the citations?

Mr. AITCHISON. Not at the moment. Justice Holmes, I believe, said "But the order of the Commission must be reasonable." But the offense there was a discrimination because they did not obey the order of the Commission with respect to one person and did obey it with respect to the others.

The CHAIRMAN. What I am trying to get at myself is, Are the requirements of this proposed legislation such as to interfere with the quick exercise of your discretion?

Mr. AITCHISON. In Ex-parte 148, for instance, we took testimony in a case which involved applications for a 10 percent increase in rates, fares, and charges. We took the entire amount of testimony in  $4\frac{1}{3}$  days, and the following Monday the Commission was out in St. Louis to hear arguments, and heard the arguments and the arguments took longer than it did to take the testimony for the reason I have already indicated. That could not be done under this.

The CHAIRMAN. We have the picture of that case. Now, what provision in this proposed legislation would interfere with that character of procedure?

Mr. AITCHISON. The provision, for instance, that the proposed report should be issued by the agency before it decided. We would have had to come back here to Washington and, instead of deciding the case, would have had to decide what kind of proposed report we would make.

Another thing: You have authorized us, in order to avoid these discriminations between State and interstate, to avail ourselves of the advice, cooperation, and assistance of State commissions. Now, is

that to be cut out so that these officers will be not permitted to avail themselves of that, in order to avoid conflict between State and interstate?

The CHAIRMAN. I do not think this committee would knowingly recommend legislation which would prevent you from availing yourselves of any assistance. That is what we want to try to avoid.

Mr. WALTER. A moment ago, Mr. Aitchison, you testified in a proceeding recently you were not satisfied with the evidence that had been adduced and you personally conducted an inquiry. Is that because you had an idea of what the decision should be and wanted to get the evidence in order to substantiate your conclusions?

Mr. AITCHISON. Not at all. But it was a question of what was a fair rate and that question was very largely dependent upon comparison of rates.

We found a case where there was an opportunity to amplify circumstances and conditions, but the matter was not in the record. If we were the Supreme Court of the United States we would take judicial notice of the fact. But under this bill we are required to take official notice of facts but we are forbidden to ask anybody what those facts are.

The CHAIRMAN. I would expect you have notified everybody.

Mr. AITCHISON. If an examiner should find it necessary, in connection with his proposed report, to find out some things, why should he notify that individual in advance?

There is a long article published in a law journal, written by Mr. Davis, in which he strongly takes us to task because that sort of thing has not been done.

The CHAIRMAN. Who is Mr. Davis?

Mr. AITCHISON. That is Professor Davis, now with the University of Texas. He was an investigator for the Attorney General's committee and for the Board of Investigation and Review.

Mr. GYWNNE. Would you agree that the prosecuting functions should be with the court?

Mr. AITCHISON. In general, when it comes to the making of a decision. Of course we cannot simply set up a bureau and let it go without any administrative supervision at all.

Mr. GWYNNE. You are objecting principally to the use of the word "investigator".

Could not some amendment be put in that section which would make it very clear that that is limited only to the prosecuting part of it?

Mr. AITCHISON. Or, say, investigation with a view to prosecution.

We investigate matters for Congress. The House will pass a resolution asking us to investigate.

Mr. GWYNNE. Could not an amendment be offered which would overcome that objection?

Mr. AITCHISON. I think possibly it could be done. But I am taking the bill as I find it.

Commissioner Splawn has spoken of the very long consideration which has evolved this procedure.

I do not feel like taking the time of the committee to go through each of the items in the first part of my statement and evaluate them.

The CHAIRMAN. You have been very helpful to me, personally, and I am sure to other members of the committee in discussing these matters with reference to your procedure.

Mr. AITCHISON. The respective procedures prescribed in the Interstate Commerce Act govern a considerable body of the Federal administrative law business of the country. And those procedures have grown to be what they are over a very long period as the result of co-operation between Congress and the courts and the Commission for 60 years, aided by numerous outside official and private surveys and critiques. Other than acts relating to the Judiciary and to public revenues, it can be doubted if any procedural questions have been considered in Congress as frequently, as earnestly, and as ably as the procedures of the Commission as treated in the succession of acts which changed the experimental act to regulate commerce into the present Interstate Commerce Act with its four parts. Saying nothing of the many bills which were presented and received earnest consideration by the committees of the two Houses, but failed of adoption, and omitting minor acts, we have successively the original Collom Act, based on the experience of the States and of Great Britain under the common law; the amendments two years later, 1889; the Hepburn Act of 1906, with five volumes of hearings; the Mann-Elkins Act of 1910; the District Court Jurisdiction Act of 1913; the LaFollette Valuation Act of 1913; the Car Service and Commission Organization Acts of 1917; the many proposals for reorganization of the functions of the Commission made to the committees of both Houses near the close of Federal control; the Transportation Act of 1920; the Hoch-Smith Resolution; the Emergency Transportation Act of 1933; the studies and three long reports of the Federal Coordinator of Transportation; the Motor Carrier Act of 1935; the Transportation Act of 1940; the Freight Forwarder Act of 1942; and, finally, the bill now favorably reported and on the Senate calendar, which will make some minor procedural changes in the act.

The Interstate Commerce Act, amended more than 40 times, has had a prolonged general legislative overhauling on an average every 5 years, and it will probably be continued to be overhauled.

As I have said, at the present time there is a bill pending in the Senate, favorably reported, which makes some modifications in that procedure. I think the same bill was passed by the House at the last session.

I think it safe to say, Mr. Chairman, without exaggeration, that in the sitting time of the House and Senate, in the aggregate, more than a year has been spent in the development of the procedure of the Interstate Commerce Commission and the substantive portions of the act.

With respect to the supplemental acts already mentioned, either Congress has subjected them automatically to evolving changes or procedures in the main act, or they are governed by special procedures which have been considered suitable for the precise subject. Nobody has suggested changing them except in this series of administrative law bills, the history of which was given last Thursday. I should also mention the more than 400 decisions of the Supreme Court which have gone far to shape the Commission's procedure.

I wish now to advert to the Commission's general rules of practice, which are applicable to these processes of rate-making, investigation,

or adjudication. They likewise are a growth, from the original code framed by Thomas M. Cooley and a former distinguished member of the House, affectionately called "Horizontal Bill" Morrison, and their colleagues.

Mr. WALTERS. You say your Commission has been overhauled once every 5 years. These amendments that have been adopted were largely procedural, were they not?

Mr. AITCHISON. Procedural?

Mr. WALTERS. Yes.

Mr. AITCHISON. Both procedural and substantive.

Mr. WALTERS. If Congress found it necessary to overhaul your agency as frequently as it has been overhauled, do you think a general law might obviate the necessity of our passing legislation such as this which is before us?

Mr. AITCHISON. There could not be a general law that would have obviated the necessity for amendments which are pending in the Senate bill which is now on the calendar.

But the question is as to the adequacy of the present rules. The Commission's rules are intended to be helpful, and the Commission's practitioners so regard them. They contain many "shoulds" and as few "musts" as possible. They are just the sort of a manual of procedure that would have helped me when as a young lawyer I went from Iowa out to Oregon and started practice, as I did, in an untried field.

We wrote them having always in mind that many of our practitioners are not professionally trained in the law. Their spirit is shown by rules 1, 2, and 3, reading as follows:

Rule 1. *Scope of rules.*—These general rules govern procedure before the Interstate Commerce Commission in proceedings under the Interstate Commerce Act and related acts, unless otherwise directed by the Commission in any proceeding.

Rule 2. *Liberal construction.*—These rules shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

Rule 3. *Information; special instructions.*—Information as to procedure under these rules, and instructions supplementing these rules in special instances, will be furnished upon application to the Secretary of the Commission, Washington, D. C.

I do not believe that is the spirit the American Bar Association follows. I regret to say.

Now, to answer the question of Chairman Sumners, for light on how the directives of the agencies were established. I answer with respect to my own agency. The method employed in formulating the Commission's general rules of practice is, in general, that which has been followed by the Commission in the formulation of many of the regulations which the law requires shall be made.

Of course, if the statutes provides a particular method, or requires a hearing, or any other procedural step, that direction is followed. When a hearing is not in terms required, it is always accorded if the nature and importance of the matter makes it desirable. There are cases, such as those growing out of conditions of emergency, when the Commission has to act without hearings; informal conferences are held when possible. Sometimes the Commission must act on the basis of its own knowledge, and act quickly. The criticism which has come to us if of "formalism" in the conduct of these investigations which lead to the conclusion.

The CHAIRMAN. When you do act in emergencies, you base your action upon general knowledge, and do you file a statement of the facts on which you base your determination?

Mr. AITCHISON. In fact, the act permits that in a case of that sort.

But to recur to the manner in which most recent revisions of the rules were accomplished, as typical.

The general specification laid down in the act is significant. The Commission may adopt—

such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division, individual commissioner, or board, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States.

That is section 17 (3).

I call particular attention to this language—

which shall conform, as nearly as may be, to those in use in the courts of the United States.

Mr. CHELF. That is no guide, is it? It does not guide you, does it?

Mr. AITCHISON. I think it does. With respect to the matter of evidence, we are authorized to make rules with respect to evidence. I think evidence is comprehended within the scope of procedure, and I think there is authority for it.

Mr. CHELF. You say you follow their rules of evidence in the courts as far as you can. Who determines what "how far" is, or when it shall be available, or how far these rules follow the procedure?

Mr. AITCHISON. That is a question that has to be determined by somebody.

Mr. McFarland is in error when he says there are no Federal rules of evidence. There are statutes of the United States which prescribe how matters that shall be established.

Mr. WALTER. I do not think he said that. I think he said there are no equity rules.

Mr. AITCHISON. There may be no equity rules but there is, as I recall—I believe the new civil rules of procedure provide for the rules formerly in equity, or the rules of the State where the hearing is being held, whichever is the more liberal, shall be applied.

Mr. WALTER. That is the substance of the rule?

Mr. AITCHISON. That is the substance of the rule. That, Mr. Congressman, we have woven into our rules of practice.

Mr. CHELF. That rule does not give you much of a guide. Who will determine that? You and I might disagree on the question of liberality.

Mr. AITCHISON. Somebody has to decide that. When the Commission sets a procedure it gives the parties a focus on which they can argue the question.

We undertook a revision of our rules after the passage of the new Code of Civil Procedure. Following the Transportation Act of 1940 there was a somewhat general desire that the rules of procedure last published as an entirety in 1935, be consolidated and revised, and we undertook the task. The proceeding is carried on our docket as ex parte No. 55.

Recently there had been three searching outside examinations of the Commission's rules as they stood and had been administered: (1) By the staff and members of the Attorney General's Committee on



Administrative Procedure, (2) by the long hearings of the subcommittee of the Committee on the Judiciary of the Senate, headed by Senator Hatch, and (3) by the results of a wholesale canvass of members of our bar.

I will call some witnesses in reference to that matter. The Association of Interstate Commerce Commission Practitioners had a very competent standing committee on procedure headed by Mr. McFarland, who testified here last Thursday, and who as a member of the Attorney General's committee had become familiar with the Commission's practice.

A special committee consisting of Mr. La Roe, Mr. Turney, and Mr. Miller, who also testified on Thursday, was appointed by the association, and gave generously of time and skill to aid the Commission's Committee on Rules and our staff examiners, who, by the way, H. R. 1203 would have forbade us to utilize for this purpose, in drafting a proposed revision, because they performed under me.

Mr. GWYNNE. Are you not stretching that a little?

Mr. AITCHISON. I do not think I am; if I am stretching it, let us take it out.

Mr. WALTER. Leave it in the record.

Mr. AITCHISON. I am willing for my statement to stay in.

I understand that Mr. McFarland's report that it was informally agreed by his committee should function upon the request and in aid of the special committee so far as the new rules were concerned and to that end collected views as to the proposed rules of practice and transmitted them to the chairman of the special committee, on which Mr. Miller was sitting.

In passing, I note from this report of Mr. McFarland's committee that—

the imminence of war as it developed in the fall of 1941 and culminated early in December effectively suspended all legislative and most other activity on the subject of administrative procedure. While some investigations in the States proceeded, most associations of practitioners properly felt impelled to turn their attention to wartime legislation and administration. In common with the general movement, the committee on procedure of the Association of Interstate Commerce Commission Practitioners deemed it impracticable to do more than answer inquiries and perform such incidental functions as might be referred to it.

The proposed revision was given widest publicity, and comments were invited.

I do not wish to tire the committee, but I ask indulgence to quote from two general comments made responsive to the Commission's request: One statement was, in part:

The present rules of practice of the Interstate Commerce Commission have worked satisfactorily over the years, have operated fairly as to all parties before the Commission, and are familiar to and understood by the large body of persons dealing with the Commission. For these reasons it is not believed that any substantial change or revision in these rules is necessary, except as additional provisions may be required by reason of the enlarged functions of the Commission. However, if a complete revision is to be undertaken, the task should be approached in the light of the satisfaction given by and workability and practicability of the present rules.

That statement was made on behalf of the American Association of Railroads and the American Short Line Railroad Association, and among the signers was Mr. Miller, who testified before the committee on last Thursday.

I believe the comment filed by a member of the Attorney General's Committee on administrative procedure, Prof. Ralph F. Fuchs, is relevant:

In general I am impressed with the well-knit character of the rules, which are sensibly organized. They are also well expressed and easy to understand, at least for one who has familiarized himself with the functions of the Commission.

But the Commission did not consider this sufficient. The proposed rules and comments were set down for oral argument on the remaining narrow points of difference, and were argued for a full day, before Commissioners Porter, Mahaffie, Splawn, and myself. Then the entire Commission considered them and adopted them July 31, 1942, to become effective 45 days later. All this was in a proceeding as to which the law did not require any notice at all.

What was the result?

The rules have been in operation for nearly 3 years, and no one has moved for any change.

So much for the statutory and commission-made rules of procedure.

The CHAIRMAN. As a matter of fact, Mr. Aitchison, does this proposed legislation greatly change your functions in any way?

Mr. AITCHISON. Not our functions, but it does unduly change our customary practice in some respects, some things that we think are working well.

The CHAIRMAN. Your rules and regulations have developed under legislation enacted by Congress and as the result of your broad experience, have they not?

Mr. AITCHISON. We think so.

The CHAIRMAN. It has not been entirely without some legislative direction?

Mr. AITCHISON. We set these rules down for hearing before the Commission and the Committee on Rules and Reports, and as Commissioner Splawn explained to you, there is a full day's argument on the question of objections, and that gives us an opportunity to know just what the situation is.

What has been the result? The rules have been in effect for 3 years and there has been no proposal for any change in them.

Mr. WALTER. What rules would be nullified through the enactment of any one or all these bills?

Mr. AITCHISON. All the rules which deal with the manner of getting out a proposed report, and I think might have the effect of repealing by implication section 17 of the Interstate Commerce Act.

The CHAIRMAN. May I make an inquiry of Dr. Splawn? We have to close this hearing in a few minutes because the House will be in session.

Dr. Splawn, do you have some witnesses from outside of the District whom you want to present so they can go home?

Mr. SPLAWN. Mr. Ames, who will follow Commissioner Aitchison, resides in Washington, but Mr. Rosenbaum, who is from outside of the District and who represents the nonlawyer practitioners, may want to leave; I do not know about that.

He has a statement which he would like to put in the record, which he will make to the committee.

The CHAIRMAN. If he has a statement which he would like to put into the record he may file that statement.

Mr. ROSENBAUM. I do not have any written statement. I just wanted to call attention to certain matters that we consider an oversight on the part of the authors of these bills. I am not a lawyer, Mr. Chairman.

The CHAIRMAN. I do not think we could properly interrupt Mr. Aitchison's statement now, but if you could submit to me a brief written statement of these matters that you think you want to mention, the oversights that you have indicated, it would be very helpful.

Mr. ROSENBAUM. I will be glad to stay here a day or two if necessary, Mr. Chairman.

The CHAIRMAN. That is up to you.

Mr. ROSENBAUM. I came prepared to do that.

The CHAIRMAN. You want to appear as a witness in this matter?

Mr. ROSENBAUM. Yes, sir.

The CHAIRMAN. You can arrange that with Dr. Splawn. We can meet tomorrow morning.

Dr. Splawn, you can determine that and arrange it in any way you like. We have to go to the House now.

(Thereupon the committee adjourned, to meet tomorrow, Tuesday, June 26, 1945, at 10 a. m.)



## ADMINISTRATIVE PROCEDURE

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TUESDAY, JUNE 26, 1945

HOUSE OF REPRESENTATIVES,  
COMMITTEE ON JUDICIARY,  
Washington, D. C.

The committee met at 10 a. m., Hon. Hatton W. Sumners (chairman) presiding.

The CHAIRMAN. Mr. Aitchison, will you continue with your statement?

### STATEMENT OF CLYDE B. AITCHISON—Resumed

Mr. AITCHISON. Mr. Chairman and members of the committee, shortly before adjournment yesterday, Congressman Walter asked me for citations to the three Supreme Court decisions involving emergency orders of the Commission. They are *Avent v. United States* (266 U. S. 127); *U. S. v. P. Koenig Coal Company* (270 U. S. 512); *United States v. Michigan Portland Cement Company* (270 U. S. 521).

These cases, as I recall it, were decided by a unanimous court. The first was by Justice Holmes, the last two were by Chief Justice Taft.

There was a fourth case which was cited in 270 United States, the Peoria and Pekin Union case, which involved the question as to whether certain operations were within the language of section 1, paragraph 15, of the act, and they held they were not. I did not have that case in mind when I spoke of the three cases yesterday to Congressman Walter.

Mr. SPRINGER. What was the page of the 270 U. S. case?

Mr. AITCHISON. There were two cases, pages 512 and 521.

I then wish to make clear that under H. R. 1203 the exclusion of certain functions by section 2 (a), such as those which by law expire before July 1, 1947, and certain others, would have the curious effect of leaving these emergency powers that were involved in these three cases still within the scope of operation of H. R. 1203 as respects railroads; but, as to motor carriers and freight forwarders, to which the provisions of the emergency section mentioned were extended by the Second War Powers Act of 1942 temporarily—those functions would be excluded from the operation of H. R. 1203. Certain service orders of the Commission would then be governed by H. R. 1203; certain others as to a different type of carrier would not be governed by H. R. 1203.

In my testimony yesterday I spoke of the many cases in which the Commission is required to issue a rule to hold a hearing. That is required by the practicality of the situation. The question was raised why in such cases the party affected should not be permitted to take

his testimony into the court at once. Now, under section 17, paragraph (6) of the act, he has a very broad right to come to the Commission, to make application for rehearing, reargument, or reconsideration of the same or any matter determined therein. And it seems to me this is the proper course; because, if there were facts which the interested party desired to have considered which were not available to the Commission within the limited time during which it had to act, the right to ask the Commission to consider them being saved to the party by section 17-6, it is only fair he should come to the Commission and ask that the rule be modified not only for his benefit, but for the benefit of all others who may be concerned, and that the administrative discretion be brought to bear upon a true, accurate, and full knowledge of the facts. If he has relevant facts which make a continuance of the rule unreasonable, the general policy of law has been he should exhaust his administrative remedies before going into court.

Of course, we are talking here about extreme cases—these emergency cases. The court, in such a case, finding an administrative question present, would be likely to stay its own proceeding until the complaining party at least had offered to show the Commission by its rule, which we are postulating the law permitted them to make without a formal record, should be considered and heard.

Mr. JENNINGS. Suppose you just give us an instance where such a rule as you are now discussing must be made on the theory it is to meet an emergency—just one illustration. I want the facts.

Mr. AITCHISON. There have been hundreds of them made. They are being made almost daily during the present war—the routing of freight around particular terminals. The very first order that ever was entered by the Commission under that emergency provision happened to be one which I drew and it authorized the carriers to disregard the routing instructions which the law permits the shipper to give and which the law makes binding upon the carrier—to disregard those instructions in cases where the prompt and direct movement of freight would otherwise be hampered.

Mr. JENNINGS. You would have congestion on the line of the certain road in question and you could order the routing changed?

Mr. AITCHISON. Yes. And the second order under that was one which required the movement of 65,000 empty freight cars, as I recall, in one direction, and up into the tens of thousands of another type of car in the reverse movement.

The Koenig cases involved priority in the use of coal car equipment. The only way at that time whereby the social end of seeing that hospitals and Government buildings and common carriers and utilities were kept going could be carried out was by the use of the Commission's car service provisions. And Koenig and the Michigan Portland Cement Co. put in a priority claim, I believe, that they wanted priority coal for a hospital, and the Michigan Portland Cement Co. used it for making cement.

That is the type of order I have in mind.

Now, since yesterday, I have reread sections 7 and 8 of H. R. 1203, to which I am principally addressing myself, in the light of section 17 of the Interstate Commerce Act as it stands at the present time. I have also read section 10 on page 16, paragraph c, lines 15 to 19. And

I am convinced that those two sections mentioned are designed to cover completely, with one possible exception, the provisions of section 17 of the Interstate Commerce Act as it relates to the delegation of its work.

You have before you the sections I have referred to and doubtless are more familiar with them than I am. Section 17 is wholly too long for me to read it to you. If you are interested in following it directly, may I throw out a valuable suggestion, that if there is anything you want to find in the Commerce Act, it is title 49 of the United States Code; so this is the United States Code 49, section 17.

The first paragraph permits the Commission to divide into divisions. That is a feature which is not within the present act except perhaps by reading it in. The word "divisions" I do not believe is mentioned in H. R. 1203. The second paragraph authorizes us to assign particular work of functions to particular divisions, or to members of the Commission individually, or to a board to be composed of three or more eligible employees of the Commission to be designated by such order, for action thereon, and of course gives the Commission power to supplement and modify those assignments at any time. I call attention to this: By the present law, "the following classes of employees are eligible for designation by the Commission to serve on such a board: Examiners, directors, or assistant directors of bureaus, chiefs of sections, and attorneys."

Now, H. R. 1203, if it authorizes us to create a board at all, says that that board shall be composed of individual members of the Commission and examiners, and it eliminates the authority which we have to set up a board which shall consist in part or wholly of directors or assistant directors of bureaus, chiefs of sections, and attorneys.

When we come to a matter like the revision of our tariff rules, we have a most highly complicated matter. Of course, particularly if H. R. 1203 became a law, the Commission would be presumed collectively to have full and final knowledge of the technique required for a revision of those rules—and we will have to revise them pretty soon. But there is nobody better qualified to do that job in the first place and to write the recommended decision than the director of the bureau and his assistants, who are laboring with the code of tariff rules and have been laboring with it all these years.

Mr. JENNINGS. Do I understand you are discussing subsection (c) on page 7 of H. R. 1203—separation of functions?

Mr. ARCHISON. No; I am not. I am referring now particularly to sections 7 and 8 which relate to hearings, and which provide who can hear proceedings. There is not any provision there that we can set up a board for one of those technical questions such as that, or for the revision of the safety appliance rules, or for consultation to help us when we make regulations for the safe transportation of explosives.

For one, I disclaim any such omniscience as to entitle me to sit in judgment without the advice and aid of the experts we have gathered around us. In the case I mentioned of the tariff rules—

Mr. JENNINGS. Just what particular language is it you think would hamper you in the discharge of your duty, or hamper the Commission in the discharge of its duty; what particular language is it you think would do that?

Mr. AITCHISON. Section 7, paragraph a, page 10, "in a hearing pursuant to sections 4 or 5"—section 4 relating to "rules" and section 5 to "adjudications":

SEC. 7. In a hearing pursuant to section 4 or 5—

(a) Presiding officers.—There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, \* \* \*

That is the Commission, I take it.

Mr. JENNINGS. Does not that clearly mean that either the whole Commission would hear the matter, or else some designated representative of the agency?

Mr. BRYSON. Or one member of the Commission.

Mr. JENNINGS. Yes; one member of the Commission.

Mr. AITCHISON. Why, certainly it does. The point I make is that under the present law we can make a board, which consists of Director Hardie and his two Assistant Directors, to take up the matter of tariff revision and give us a code of rules which we can put out as a proposed report and let everybody shoot at. That is forbidden.

Mr. JENNINGS. It seems to me there is nothing here that would hamper you in the discharge of your duty.

Mr. AITCHISON. If you will permit me to complete the sentence—you have not the whole sentence in mind yet—

There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, State representatives as authorized by statute, or examiners appointed as provided in this act.

In order to make this parallel with section 17, you have to put in there at that point "directors, assistant directors, chiefs of sections, or attorneys" and those words are out. It may be this is better; I am not arguing that at the moment; but I do want to point to the conflict, because it was intimated to me yesterday that I could not tell a conflict when I saw one.

Mr. GWYNNE. That only has to do with who shall preside; this does not prohibit people sitting in with and advising you.

Mr. AITCHISON. It would prohibit the examiner who sat at that hearing taking testimony from consulting with those gentlemen, in the other portion of the act.

Mr. WALTER. He would have a perfect right to consult with them.

Mr. AITCHISON. I am glad to hear you say that, because we have not been able to so read the rule. And, Mr. Walter, we are going to take this (and I think everybody will) in good faith and try to make it work; but we have to feel when Congress uses language which says "he shall not consult" with respect to any matter with anybody else except in a formal way, that Congress means that.

Mr. WALTER. That is exactly what Congress means and we also mean to make it impossible for star chamber proceedings to be held and rights to be determined without the parties interested having an opportunity to participate in the discussion.

Mr. AITCHISON. I am not talking about a star chamber proceeding, Mr. Walter.

Mr. WALTER. Oh, you are.

Mr. AITCHISON. I am talking about a case where we set up a board under the statute, and what that board should do is provided by the



statute. If there was a public hearing involved, it would be required, just as this bill requires, to put out a proposed report and let that be served and let the parties except to it. But why should we be deprived of the opportunity to use our experts in that manner?

Mr. JENNINGS. Now, does it deprive you of that right and opportunity? Suppose you send an expert out and he makes an investigation and is in possession of the facts: Do you make insistence that under this act the Commission could not put him on the stand, or use the result of his investigation?

Mr. AITCHISON. Not at all.

Mr. JENNINGS. To enable them to arrive at a correct conclusion?

Mr. AITCHISON. Not at all. We have put many of them on and it is our policy, whenever our people have facts of that sort, to do so. But I am talking about a case where we are setting up a board which is to take the testimony, and I am simply addressing myself to the sole question as to whether H. R. 1203 is so necessarily inconsistent with the present section 17-1 as to repeal it by implication—necessary implication.

Mr. SPRINGER. Under that section 7 to which you just referred a little while ago, that section provides that "there shall preside at the taking of evidence," that is, the ascertaining of the facts, "the agency or one or more subordinate hearing officers." It does not attempt to set up who shall hear or take the evidence; that section just provides as to the presiding officer.

Mr. AITCHISON. Well, I do not know how the whole agency is to preside. When the whole agency is there, I suppose the chairman presides.

Mr. SPRINGER. It does not say the entire agency.

Mr. AITCHISON. No; but it says "there shall preside at the taking of the evidence (1) the agency."

Mr. SPRINGER. The agency or one or more subordinate officers designated by the members of the body. You can designate one.

Mr. AITCHISON. Naming who they are.

Mr. SPRINGER. That is right.

Mr. AITCHISON. We can set up a board consisting of Director Hardie if we wanted to?

Mr. SPRINGER. That is right. And do not you do that at your hearings—designate one to preside at the taking of testimony?

Mr. AITCHISON. Yes; but H. R. 1203 would forbid our designating Director Hardie, because he is not an examiner; he is not a member of the Commission; he is not a State commissioner.

The CHAIRMAN. Mr. Aitchison, what additional or amendatory language would you suggest to the provisions of the bill in question, or whichever one you want to consider, which would give you the opportunity to use your personnel and your whole facilities to the best advantage, and yet help to avoid some of the practices which the committee evidently has in mind it would like to have avoided?

Mr. AITCHISON. That is a very broad question, but I shall confine my answer, if I may, to the specific points we are discussing, which would, of course, involve a reconciliation of the language of section 7, paragraph a, with the language of section 17, paragraph 2. But there are other things besides that.

The whole theory of sections 7 and 8 of the bill is that the special procedure which is provided there shall result in a proposed report, or recommended report, being made by the officers who heard it even if there were a full division, I suppose, of the Commission—three of the Commissioners—before the entire Commission acts. I think that is a fair summary of the final provisions of sections 7 and 8 of the act.

Now, that is not our present practice, and it is not required by section 17 at the present time. Section 17 does require proposed reports in certain types of cases; it does not require any proposed report when a division of the Commission, consisting of three—of whom two are a quorum—hears a matter, or when the entire Commission hears the case. So, to that extent, again sections 7 and 8 go beyond the provisions of section 17 of the act at the present time.

Mr. JENNINGS. Just reading from section 8, it seems to me that that plainly confounds you in the statement you have just now made, because subsection (a) of section 8 provides that where some subordinate officer of the Commission takes the testimony, that person may make the initial decision.

Mr. AITCHISON. Right.

Mr. JENNINGS. And if the board of Commission do not undertake to review it and lets that initial finding by this subordinate official stand for a certain period of time, then it is just like the report of a master in chancery which is unexcepted to within the time allowed by law; it automatically becomes final. And if the interested party is not satisfied with it, then there may be a hearing, upon proper exception, by the whole board.

It seems to me you are sticking to the bark in some of your criticisms of this language.

Mr. AITCHISON. Perhaps I am, but it is my duty—

Mr. JENNINGS. I am glad to hear your views about it. Go ahead.

Mr. AITCHISON. May I point out this: You, I think, have correctly stated the tenor of section 8, but subordinate officers are defined, and subordinate officers by section 7, paragraph (a), line 9 on page 10 would include the Chairman of the Commission and the two senior Commissioners, or three juniors, or anybody else. It would include a division of the Commission—

Mr. WALTER. Oh, no.

Mr. AITCHISON. "Subordinate hearing officers designated from members of the body." Now, if that is sticking to the bark, I have just got to stick to the bark. And I do not like to be called subordinate when I happen to have been Chairman of the Commission and preside with certain of my colleagues at the taking of testimony.

Mr. JENNINGS. If you are a member of the Interstate Commerce Commission—

Mr. AITCHISON. Why, I have been for 28 years.

Mr. JENNINGS. I beg your pardon; I just had in mind you were counsel for the Commission here.

Mr. AITCHISON. No; I am a member of the Commission.

Mr. JENNINGS. All right; I apologize for not having you properly in mind. I was not here yesterday.

Mr. AITCHISON. I am probably the one who ought to apologize.

Now I want to ask the Congressman if he will be kind enough to turn to section 10 on page 16, paragraph (c), line 15 to 19:

\* \* \* Any agency action shall be final for the purposes of this section notwithstanding that no petition for review, rehearing, reconsideration, reopening, or declaratory order has been presented to or determined by the agency.

I want to contrast that, if I may, with section 17 of the act, paragraph 9. And, mind you, this amendment is one which Congress enacted September 18, 1940; it is nothing very old. Section 17 says:

When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such a decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Now, if I am sticking to the bark in this as being contradictory, I cannot be helpful to this committee—

Mr. GWYNNE. Is it your position that nothing in this law shall in any way affect the conduct of your agency?

Mr. AITCHISON. Not at all.

Mr. GWYNNE. I think we have a right to change the law, do we not?

Mr. AITCHISON. Certainly.

Mr. GWYNNE. That is what we are doing.

Mr. AITCHISON. I am not at all sure but what you are suggesting here is better. But it was suggested here yesterday and urged with considerable emphasis from the bench, that after all you are just taking our practice and our law, and if there is nothing inconsistent with it, why, well and good.

Mr. GWYNNE. If this bill does not change the existence procedure of these bureaus, I think it had better be thrown in the wastebasket. That is the purpose of it, as I understood.

Mr. AITCHISON. I am not saying our procedure is the last word, but I hope with the flexible powers which Congress has given us we can still do some experimentation and pioneering in the matter of correct procedure.

Mr. GWYNNE. Do not you think we might as well stick to some of the old formulas and say that the prosecutor and judge cannot be the same person? You do not care to experiment with that, do you?

Mr. AITCHISON. No; I do not.

Mr. JENNINGS. Frankly, I have not had your Commission, or the Commission of which you are a member, so much in mind in my consideration of this proposed measure; but I think we have some other governmental agencies that have offended egregiously in this matter. I have not had in mind and have never heard any criticism, as I recall, of the Interstate Commerce Commission being arbitrary or lawless, and disposed to trample on people's rights; but there are some agencies under the present set-up that have been on the rampage.

Mr. AITCHISON. I thank Your Honor for that observation. It is a little consolation, considering that only last week we were reversed by the Supreme Court because certain testimony had been excluded

from the record by one of the State boards, and we had sustained its ruling.

Now, my opinion is—and I think, having been called to the bar nearly 50 years ago that I can state it for whatever it is worth, and it seems good to me if it does not to anybody else—that the provisions of sections 7 and 8 of this bill and section 17 of the Interstate Commerce Act cannot possibly stand together. It may be, as Congressman Gwynne suggests, that section 8 is better; but certainly there is going to be confusion; it is going to require court decisions. We do not know, except by implication, what of section 17 is repealed, and I direct the attention of this committee to the fact that in this bill it is provided that future legislation in future Congresses shall not be construed to affect this legislation unless it expressly says so. I ask the same privilege with respect to the Interstate Commerce Act. If it is to be amended, if it is wrong, set your legislative reference people to work, your legislative counsel, and let us talk the thing over with them and let us come to a proper repealing clause, and know exactly what the law is we are required to enforce, and not to have to take it to the Supreme Court.

Mr. JENNINGS. Of course, you are fully familiar with the principle that repeals by implication are not favored.

Mr. AITCHISON. I understand. And I am also thoroughly familiar with the principle that where a subject matter is treated as a whole by a legislative body subsequent to earlier, more specific legislation, and the two cannot stand together, that the later expression of the legislative will controls.

Now, I hate to throw any aspersions or "asparagus" at the draftsmanship of this bill. It comes from eminent authority, and I know I am myself subject to criticism as being meticulous—

The CHAIRMAN. That is all right; just go after them.

Mr. AITCHISON. All right: with the chairman's permission, I will do so. And I am going to start with the first paragraph of the act, other than the one which says that this act may be cited as the "Administrative Procedure Act." Section 2 defines "agency" and says:

"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

Then follows certain functions which are excepted, which I think I need not go into. I have already, probably tediously, summarized the provisions of section 17 of the act. I should have called attention also to the Motor Carrier Act which provides for State boards being given jurisdiction in a "noble experiment" of the decentralization of Federal power, which is working and has worked out very well. But now I want to ask when the Congress says that a division of the Commission shall have all of the powers, duties, and responsibilities of the Commission when it acts, is it an "authority"? And, for that matter, when an individual Commissioner acts under a delegation of power under section 17, he acts under authority of the Congress and he is given the same authority as the Commission, and the word "authority" is used in the bill, is he an agency or not?

Mr. WALTER. Well, you are certainly splitting hairs pretty thin when you raise that question.

Mr. AITCHISON. Well, what is the answer; what is an agency supposed to be?

Mr. WALTER. The answer is "Yes"; no question about it.

Mr. JENNINGS. Just like a court meets in banc and hears argument and the case is assigned to one member of the court and he goes off and later brings in an opinion: The other members have not read that record, but they concur in his opinion and it becomes the opinion of the court. Your procedure is analogous to that.

Mr. AITCHISON. All right. If "agency" means the entire Interstate Commerce Commission, then I submit, as you go through this act and read it, you will find where "agency" as used throughout the act has a different meaning.

Mr. JENNINGS. Is it your position that the Congress ought not to pass an over-all statute?

Mr. AITCHISON. Not at all.

Mr. JENNINGS. Undertaking to hold these various numerous governmental agencies within the limitations of the law of the land?

Mr. AITCHISON. Not at all, Congressman. I am not talking about anybody except the Commission of which I am a member.

Mr. WALTER. May I direct your attention to the definition of "agency" made by the Attorney General's Committee on page 4 of H. R. 1206, paragraph (a):

"Agency" means each office, board, commission, independent establishment, authority, corporation, department, bureau, division, or other subdivision or unit of the executive branch of the Federal Government, and means the highest or ultimate authority therein.

Mr. AITCHISON. That certainly is more precise than section 2 as we have it in H. R. 1203.

Now, I want to ask this and split hairs again: I find the courts are excluded from section 2. Is the President? He makes rules; he makes adjudications of the type which are referred to in this act. Now, that is none of my business; I am just a citizen and just throw that question in for whatever it is worth. I do not know what the intent is, of course.

Mr. JENNINGS. Well, if it operates to forbid the President from operating as a legislative agency, I would say it is good law.

Mr. AITCHISON. I cannot debate that, because that is out entirely of my sphere. But I want to mention one more obscurity which I would be glad to have the committee help straighten out, for I may have a complete misunderstanding of what this act is.

Take the definition of "rules" and "rule making." That is page 2, paragraph 2 (c). It seems to me obvious that the word "rule" would not include the rate as made, unless it is brought in afterward.

The CHAIRMAN. What addition would you make in the language to which you refer in order to make it clear?

Mr. AITCHISON. Well, they have tried to do that in the Senate revision by inserting this language—

Mr. WALTER. Where does that appear?

Mr. AITCHISON. It is at the top of page 3 of the Senate revision, where they say "rule making" means agency process for the formulation, amendment, or repeal of a rule." That is what is in the House bill, and then they add in the Senate bill "and includes rate making, or wage or price fixing."

Mr. WALTER. That is at the top of page 3, column 2.

Mr. BRYSON. That is S. 7, is it not?

Mr. AITCHISON. S. 7. Now I shall mention just some practical difficulties about that for your consideration, for whatever they may be worth—little or nothing, possibly.

Mr. WALTER. If that language "rate making," then, were included, you would have nothing to object to?

Mr. AITCHISON. I think I will ask that the language be further clarified in respect to some matters I will bring to Your Honor's attention in just a moment, because it seems to me obvious that rate making is anomalously included under the term "rule making" when the rate is not a rule. It is just a matter of English. But passing all that, now, we make rates for the future; we make rates for the past; we fix rates as reasonable in the past. We are performing there the function of a common-law jury.

Of course, our orders are only prima facie evidence and the matter has to go before a jury if there is more than \$20 in dispute. I refer, of course, to reparation cases. But it is clear and it is well worked out by Justice Roberts in the Arizona Grocery case—*Arizona Grocery Company v. Atchison, Topeka & Santa Fe*—that the Commission acts in the one case, when it reviews these past rates, in a quasi judicial capacity and, for the future, it is performing a legislation act.

Now, I have no objection to your calling that a rule, Congressman Walter. Pardon me for addressing you personally, but you raised the question yesterday with respect to whether or not, after all, we did not have controversies between A and B concerning a rate and whether C could not later come along with another case.

Assume we find in the case of A versus B Railway Company that the rate is unreasonable; as was held by the Supreme Court of the United States in *A. J. Phillips & Co. v. Grand Trunk Western Railway*, anybody can take advantage of that finding, whether a party to the proceeding or not, and there we are acting with respect to a past rate. I would like to ask if you cannot clarify that for us.

The word "order" as we find it a little later seems to go back to the original idea of the Attorney General's Committee and the American Bar Association, that "rule" is a legislative matter of general applicability, while "adjudication" refers to particular matters. Yet when the revised section 2 (c) puts rate making in with rule making, even such matters as our shortened procedure cases which are tried virtually on affidavits where there is no hearing at all; the hearing is dispensed with—all those things, that sort of procedure against one carrier with respect to one commodity from one point to another point—all of those things become rule-making and are governed by principles which apply when we are laying down a legislative rule for the future.

It does not seem to me that is good administration. The term lacks precision to those of us who are going to be compelled to administer this law. Does it mean only rates for the future, these cases I have mentioned, as was held in *Baer Bros. v. Denver & Rio Grande Railway* (233 U. S. 479)—that rates for the future and for the past may legally be brought together before the Commission and disposed of upon the same petition? That rule is settled. But when we do that with respect to the past and substitute ourselves for a common law jury, is it an adjudication, or rule making; or is it rate making? I do not know and I would like to have it clarified.

Mr. SPRINGER. How would you suggest that that be clarified so as not to cause you any confusion?

Mr. AITCHISON. I think the original intent was better, to let the "rules" speak with respect to those matters of general applicability which necessarily have to be expressed in more or less general terms as a substitute for the specific will of Congress. I do not think it will work out in the long run to attempt to assimilate the proceedings of the kind I have just mentioned, but it is the same process as the one of prescribing the form of carriers' accounts to be kept uniformly, as the statute provides. There are many questions which are more or less directly connected with rates, but not with the price itself. This is not restricted to "price."

Take the terms of bills of lading which we prescribe under authority of law "to prescribe a uniform bill of lading"; or the making of a classification of freight, which is a most intricate and voluminous job; and then take a case where we find preference and prejudice and do not fix any rate at all, but simply say the rate from point A to point B should not exceed the rate from point C to point B, and leave it to the carriers—and are compelled to leave it to the carriers according to some counsel—to adjust the one or the other; we do not fix the price at all, do not fix the rate at all; we simply fix the relation. Or take the interpretation of conflicting or obscure tariffs to determine what the rate is or was—and that is one of our most difficult questions; or the division of through rates between the participants.

You might say, maybe, that I got off wrong a minute ago when I said those are primarily matters of adjudication, but I run my head up against the New England Divisions case which went up to the Supreme Court, where Justice Brandeis in a most masterly opinion concerning the division of through rates as between the carriers, held it is not a matter of private concern to them alone; it is one of very grave public concern. In that case it involved the whole question of the solvency of the New England railroads, and the Supreme Court sustained the decision on very broad grounds with merely typical testimony, because of the character of the issue and the public interest which was involved. That is more analogous, I would say, to rule making, yet it laid down a precise formula applicable to an individual rate—every individual rate.

The CHAIRMAN. What sort of formula, if you can tell us briefly, was laid down with reference to the division of rates?

Mr. AITCHISON. They simply gave the New England lines a greater share than they were getting.

The CHAIRMAN. I asked what formula did they lay down.

Mr. AITCHISON. The matter was covered by division sheets between the carriers themselves.

The CHAIRMAN. Maybe a railroad man would know what that means, but it is not clear to me.

Mr. AITCHISON. You might say "contracts"; it was covered by contracts between the railroads. But we said "You have to modify your existing contracts by giving the New England lines 15 percent more than they are getting."

The CHAIRMAN. By what formula did you arrive at that conclusion?

Mr. AITCHISON. That was done by a study, as the law provides, of the revenue needs of the carriers.

The CHAIRMAN. I am trying to get at the formula, though.

Mr. AITCHISON. The standards for the prescription of divisions are paid down in the statute itself and, among them, is the amount of money which is needed by the various carriers involved, and their importance to the public.

Mr. WALTER. Why could not that case have been decided under the provisions of this proposed law?

Mr. AITCHISON. It could; but I do not know whether it could be decided as a "rule" or "adjudication" case.

Mr. WALTER. What difference does it make?

Mr. AITCHISON. It makes considerable difference; because we were told on the opening day that normally "rules" are things that do not require notice, except as required by law.

The CHAIRMAN. Who told you that?

Mr. AITCHISON. Well, I may have misunderstood counsel, but it seems to me that is what counsel said.

Obviously there are some rules which cannot be made except in that way.

Mr. JENNINGS. Certain conclusions are reached in a case, which you affirm, and they are upheld by the Supreme Court. Of course, the Commission has been operating a long time. It has covered a broad field and a multitude of steps. It has adopted certain rules, practices, and methods of procedure that have become part of the law of the land. Do you really think that this measure will strike down all those accomplishments made over the years?

Mr. AITCHISON. Why, of course not.

Mr. JENNINGS. And that you will be wandering around on an uncharted sea and be unable to reach your objective?

Mr. AITCHISON. Oh, of course not. I have completely failed if I have given any such impression. But I am going to suggest to your Honors, if it is not lese majesty—

The CHAIRMAN. No, sir; it is not.

Mr. AITCHISON (continuing). That a bill which has been amended as many times as this has been by the Senate committee after informal discussion with some of the agencies, would probably be better if there were discussion with all the agencies and some further amendment.

The CHAIRMAN. I will tell you what I believe would be helpful, Mr. Aitchison. If you could take this Senate amendment, or one of the others that you have in mind, and could give to the committee the benefit of suggestions as to how that language might be amended in order to give you as much liberty as can be had in the discharge of your responsibilities without hampering you, I believe it would be very helpful to the committee. The committee appreciates that you and your agency want to be helpful—and I know the committee does—in dealing with this general question. I believe that that perhaps would be as helpful a thing as you could possibly do in this situation.

Mr. AITCHISON. That is a large order, and I shall present it to my colleagues to do what we can do toward complying with the chairman's suggestion.

The CHAIRMAN. I believe that that would be a very helpful thing. There is a gentleman from outside the Government, Mr. W. E. Rosenbaum, to whom I believe the committee would like to give an opportunity to speak.

Mr. AITCHISON. I am almost completed here.



The CHAIRMAN. I do not mean to interrupt you.

Mr. AITCHISON. I had intended, but I do not now think it is necessary, in the light of a good deal of the discussion, to spend some time on a discussion of the chairman's question as to who or what machinery shall be assigned to hear matters in dispute.

The CHAIRMAN. That is one of the things we are having discussion about. Let me put it this way: Do you consider that if the agency personnel that sits in judgment in the first instance here, who hear discussed the facts on which the record is made, are appointed by some agency other than yours, it would interfere with the scope of your activities? My question is involved, but I hope I have been able to indicate to you what we have in mind.

Mr. AITCHISON. It is a question of whether, if the examiners, for instance, who hear our cases were appointed by some other agency our work would be impeded?

The CHAIRMAN. That is right.

Mr. AITCHISON. Well, I find it a little difficult to answer that categorically. If we are going to have responsibility for results, and if at the end of our term the President is going to throw us out because he does not like the way we have functioned during our terms, we ought to have a very great deal of latitude with respect to the people that we employ as our confidential assistants, and people we trust. The examiners whom we sent out are oftentimes the only persons whom the general public see. They are, as far as the general public are concerned, the Commission. On their tact, their skill, their demeanor, and their honesty depends our honor, the success or failure of our work, and the future of our professional careers as members of the Commission. In the light of that, I submit that we ought to have the utmost freedom which good administration will permit. Now, we are tickled to death—and I think the Congressmen are—to have to go to the Civil Service Commission for these examiners. It takes a tremendous burden of pulling and hauling pressure off you—

The CHAIRMAN. I think we have the picture you have in mind. You do not need to go further into that. How many examiners do you have there?

Mr. AITCHISON. I cannot answer that directly.

The CHAIRMAN. Approximately?

Mr. AITCHISON. You will be surprised to know—I happen to know this—that at the present moment in the highest grade we have there are only two men who are presently available to hear cases. I know that because I have one of those highest grade cases assigned to me, and I cannot get an examiner to help me.

The CHAIRMAN. Do you know how the others are engaged?

Mr. AITCHISON. The others are assigned to other work. I think there are only four under the total grade—unable to function with respect to the hearing of cases. It is a situation we have to correct. We shall have to have more men. But that is not the entire story.

Mr. SPRINGER. Could you not approximate the number of employees and examiners you have in your agency?

Mr. AITCHISON. Of all the employees, there are more than 2,000.

Mr. SPRINGER. Yes; now, could you approximate for us the number of examiners you have, so that we will have some idea?

Mr. AITCHISON. Including motor carriers, finance, those on the formal cases, and those who are assigned to the handling of these shortened procedure cases, approximately 200 of all grades.

The CHAIRMAN. What my colleague is trying to get at is how many really exercise, may I call it, quasi judicial responsibility.

Mr. AITCHISON. Well, they all do within the ambits of their delegation and responsibility.

The CHAIRMAN. Some of them you merely send out to get some isolated facts, do you not?

Mr. AITCHISON. That is a different proposition.

The CHAIRMAN. They are not classed as examiners?

Mr. AITCHISON. No.

The CHAIRMAN. All right. We have that.

Mr. AITCHISON. We have always been very careful to keep our organization operating in such a way that it is completely public. I pass up to the bench—perhaps the members of the committee might care to glance at it—a copy of the organization make-up of the Commission.

I might call your attention to the matter of judicial review. I have here a page and a quarter that I have read over the telephone to Judge Phillips, who is chairman of the committee of the judicial conference considering the matter of review. That conference is still wrestling with the question of review of orders of these administrative agencies which are heard before three-judge courts and are appealable to the Supreme Court as of right. I merely make that suggestion.

I must mention the matter of judicial review—obviously one of great importance. As is well known to the members of this committee, and as appears in the proceedings of the judicial conference, for nearly 3 years a committee appointed by the Chief Justice has been considering the matter of judicial review of orders of administrative agencies which by law are heard before three judges and are appealable as of right to the Supreme Court. A bill has been drafted and circulated widely by the committee, of which the Honorable Orrie L. Phillips is chairman, and comments of the bench and bar have been invited thereon. That draft relates particularly to review of orders of the Interstate Commerce Commission, but, as appears by the minutes of the judicial conference, that body has in mind the possibility of making it a model bill for other agencies. While I am a member of that committee by the courteous invitation of the Chief Justice, I am not speaking for the committee. But I deem it my duty to direct your attention to the work which the judicial conference is doing upon this subject of judicial review and suggest that you give my suggestion whatever consideration is appropriate.

#### STATEMENT OF WILLIAM E. ROSENBAUM, ST. LOUIS, MO.

The CHAIRMAN. Mr. Rosenbaum, I dislike putting it this way, but we can give you just about 10 minutes.

Mr. ROSENBAUM. That is all I asked for, Mr. Chairman.

The CHAIRMAN. All right. You may proceed.

Mr. ROSENBAUM. Mr. Chairman and gentlemen, my name is William Edward Rosenbaum. My address is 952 Cotton Belt Building, St. Louis, Mo. I happen to be what is generally known as a traffic or

transportation consultant. I am not a lawyer, but I have been practicing before the Interstate Commerce Commission, as many others who are not lawyers have been.

Mr. WALTER. Maybe we can save a little of your time by calling your attention to the language in the bill as originally introduced and also in the revised text of the Senate bill, in which it is provided that any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied and advised by counsel, or, if permitted by the agency, by other qualified representatives. So you have no reason to fear anything in this legislation.

Mr. ROSENBAUM. That is, provided the House adopts the same revised text.

Mr. WALTER. The same provision is in the other bill. Every interested person shall be accorded the right to appear in person or by counsel or other qualified representative.

Mr. ROSENBAUM. But I should like to call your attention to this, Congressman: In H. R. 1203, while I see what you just quoted in lines 5 and 6, in section 6, page 8, you have failed to make that provision in line 11. You say there, beginning on line 9:

Every person appearing or summoned in any agency proceeding shall be freely accorded the right to be accompanied and advised by counsel.

We would like to have added thereto what you just read in line 5.

The CHAIRMAN. I think you may depend on that being taken care of. I understand that Mr. McFarland, in his statement the other day, said there was no disposition to disturb the existing arrangement.

Mr. ROSENBAUM. I understand that, but I should like to call your attention to what I think is an oversight in having failed to include in line 11 "or other qualified representative." All we want is that addition.

I am speaking not only for myself here, Mr. Chairman, but I am speaking also for 50 other nonlawyer practitioners. I shall leave here a list of those who have authorized me to appear for them. You will notice we have covered chambers of commerce, transportation agencies, and agricultural interests throughout the country.

The CHAIRMAN. That will be incorporated with your statement; and you may file a more complete statement in lieu of your remarks.

Mr. ROSENBAUM. I should like to have permission to extend my remarks. I have here also a telegram from the Southern Industrial Traffic League, signed by O. H. Weaver, president, which I should like to read. It is dated Griffin, Ga., June 20, 1945, and reads as follows:

Understand you will appear before House Judiciary Committee in opposition to bill H. R. 1203. As the rights of nonlawyer practitioners are in jeopardy, the league is on record opposed to this bill. Will appreciate you also speaking for us.

Now, I understand that the members of the Southern Industrial Traffic League control at least 95 percent of the shipping of the Southern States.

I have also a similar statement from the North Carolina Traffic League.

Mr. GWYNNE. You are satisfied with the wording of the Senate committee print?

Mr. ROSENBAUM. Yes; I am.

Mr. GWYNNE. That is satisfactory?

Mr. ROSENBAUM. Yes; it is.

The CHAIRMAN. I am afraid we are going to have to go to the floor of the House. I have not consulted with my colleagues, but we shall have to recess now subject to call at a future date.

We are very much obliged to all of you. We are sorry that the committee is unable to remain longer today, but there is much work that we must all attend to now. We cannot say when we will conclude or continue the hearings, but you will be notified.

(The list of parties for whom Mr. W. E. Rosenbaum speaks is as follows:)

STATEMENT SHOWING LIST OF PARTIES FOR WHOM MR. W. E. ROSENBAUM SPEAKS  
Charles E. Blaine, American National Live Stock Association, Phoenix, Ariz.

C. C. Dehne, Arkansas Rice Traffic Association, Stuttgart, Ark.  
W. A. Rohde, Chamber of Commerce, San Francisco, Calif.  
E. L. Hart, Atlanta Freight Bureau, Atlanta, Ga.  
E. T. Hayes, Container Corporation of America, Chicago, Ill.  
C. F. Real, Topeka Traffic Association, Topeka, Kans.  
W. E. Whelpley, Chamber of Commerce, Boston, Mass.  
H. D. Fenske, Great Lakes Steel Corporation, Ecorse, Mich.  
Allen Dean, Board of Commerce, Detroit, Mich.  
A. W. Dahlstrom, Chamber of Commerce, Muskegon, Mich.  
C. E. Elerick, Chamber of Commerce, Grand Rapids, Mich.  
C. E. Berg, Association of Commerce, St. Paul, Minn.  
H. Mueller, Port Authority, St. Paul, Minn.  
Carl Giessow, Chamber of Commerce, St. Louis, Mo.  
W. E. Rosenbaum, St. Louis, Mo.  
B. C. Kinman, Daniels Freight Lines, Butte, Mont.  
L. F. Van Kleeck, Brown Co., Berlin, N. H.  
C. F. Fagg, Newark Central Warehouse Co., Newark, N. J.  
Eric E. Ebert, Newark, N. J.  
C. V. Hanlon, New York, N. Y.  
George E. Mace, Commercial and Industrial Association, New York, N. Y.  
W. S. Creighton, Southern Traffic League, Charlotte, N. C.  
C. E. O'Neal, Roseville, Ohio.  
E. H. Dorenbusch, American Rolling Mill Co., Middletown, Ohio.  
R. A. Ellison, Chamber of Commerce, Cincinnati, Ohio.  
Dana B. Gee, Capital City Products Co., Columbus, Ohio.  
William J. Brown, Frank Tea & Spice Co., Cincinnati, Ohio.  
L. H. Kamp, H. & S. Progue Co., Cincinnati, Ohio.  
B. J. Tillman, Beckett Paper Co., Hamilton, Ohio.  
Frank S. Clay, Portland Traffic Association, Portland, Oreg.  
L. T. Cuthbert, Am-Franklin-Olean Tile Co., Lansdale, Pa.  
G. F. Murphy, Motor Truck Rate Bureau, Columbia, S. C.  
C. E. Logwood, Public Service Commission, Columbia, S. C.  
S. W. W. Carr, Chamber of Commerce, Watertown, S. Dak.  
G. A. Ryser, Texas & Pacific Railway, Dallas, Tex.  
C. H. Campbell, Strickland Transportation Co., Dallas, Tex.  
H. N. Roberts, Dallas, Tex.  
James G. Goodwin, Perry Burrus Elevators, Dallas, Tex.  
E. P. Byars, Chamber of Commerce, Fort Worth, Tex.  
J. A. Meyers, Fort Worth, Tex.  
R. T. Wilbanks, Montgomery Ward Co., Fort Worth, Tex.  
J. W. McCullough, Houston, Tex.  
L. D. Smith, Consolidated Chemical Industries, Houston, Tex.  
E. C. Nicar, Houston Freight Traffic Service, Houston, Tex.  
J. D. Campbell, Utah Oil Refining Co., Salt Lake City, Utah.  
E. C. Jepson, Wheeling Steel Corp., Wheeling, W. Va.  
Charles B. Bowling, Warren H. Powell, George D. Schuler, Jr., Howard D. Bergen, Transportation Rates and Services Division, Office of Marketing Facilities, War Food Administration, Washington, D. C.

(At 11:15 a. m. the committee adjourned subject to the call of the chairman.)

(NOTE.—It was later determined that no further hearings would be held.)

# APPENDIX

[H. R. 184, 79th Cong., 1st sess.]

A BILL To revise the administrative procedure of Federal agencies; to establish the Office of Federal Administrative Procedure; to provide for hearing commissioners; to authorize declaratory ruling by administrative agencies; and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Administrative Procedure Act of 1941":

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### TITLE I—GENERAL PROVISIONS AND OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE.

- Sec. 101. Declaration of general policy.
- Sec. 102. Definitions.
- Sec. 103. Delegation of authority.
- Sec. 104. Right to counsel.
- Sec. 105. Office of Federal Administrative Procedure.
- Sec. 106. Advisory committees.
- Sec. 107. Duties of the Director.

### TITLE II—ADMINISTRATIVE RULE MAKING

- Sec. 201. Rules and other information required to be published.
  - (1) Internal organization and structure.
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- Sec. 202. Formulation of rules.
- Sec. 203. Effective date of rules.
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### TITLE III—ADMINISTRATIVE ADJUDICATION

- Sec. 301. Application of title.
- Sec. 302. Appointment and removal of hearing commissioners.
  - (1) Hearing commissioners.
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  - (3) Selection and appointment.
  - (4) Basis of nominations.
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  - (8) Temporary appointment.
  - (9) Powers of provisional and temporary hearing commissioners.
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  - (3) Agencies where no chief hearing commissioner.
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  - (1) Assignment of errors on appeal.
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- Sec. 310. Record on appeal to courts.
- Sec. 311. Mistake of remedy not to preclude judicial review.
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- Sec. 313. Rules and regulations.

## TITLE IV—DECLARATORY RULINGS

Sec. 401. Power to issue rulings.  
 Sec. 402. Effect.  
 Sec. 403. Parties.  
 Sec. 404. Judicial review.

## TITLE I—GENERAL PROVISIONS AND OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE

SEC. 101. DECLARATION OF GENERAL POLICY.—The exercise of all administrative powers, insofar as they affect private rights, privileges, or immunities, should be effected by established procedures designed to assure the adequate protection of private interests and to effectuate the declared policies of Congress. While procedures should be adapted to the necessities and differences of legislation and of the subject matter involved, they should in any event be made known to all interested persons. Administrative adjudication should be attended by procedures which assure due notice, adequate opportunity to present and meet evidence and argument, and prompt decision.

SEC. 102. DEFINITIONS.—As used in this Act—

(a) "Agency" means any department, board, commission, authority, corporation, administration, independent establishment, or other subdivision of the executive branch of the Government of the United States which is empowered by law to determine the rights, duties, immunities, or privileges of persons, other than persons in their capacity as employees of the United States, by the making of rules and regulations or by adjudications which are unreviewable except by the courts. Where the context warrants, "agency" means more particularly the officer or group of officers within an agency as above defined who are not subordinate or responsible to any other officer therein.

(b) "Agency tribunal" means the officer or group of officers within an agency whose decisions in adjudication are unreviewable except by the courts.

SEC. 103. DELEGATION OF AUTHORITY.—(a) Subject to such supervision, direction, review, or reconsideration as it may prescribe, every agency or agency tribunal is authorized to delegate to its responsible members, officers, employees, committees, or administrative boards power to manage its internal affairs; to dispose informally of requests, complaints, applications, and cases; to issue complaints, show-cause orders, or other moving papers; and to govern matters of preliminary, initial, intermediate, or ancillary procedure.

(b) Every agency tribunal having more than a single member may delegate to one or more of its members, subject to review or reconsideration by it, the power to decide cases after hearing or on appeal.

(c) Where the ultimate authority in any agency is vested in a single individual, he may delegate any of his powers of final adjudication to one or more agency tribunals with such membership as he may prescribe.

SEC. 104. RIGHT TO COUNSEL.—Every person appearing or summoned in any administrative proceeding shall be allowed the assistance of counsel.

SEC. 105. OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE.—(1) There shall be appointed by the President, by and with the advice of the Senate, an officer to be known as the Director of Federal Administrative Procedure (hereafter referred to as the Director); who shall hold office for the term of seven years or until a successor has been appointed, and shall receive an annual salary of \$10,000.

(2) There shall be at the seat of government an establishment to be known as the Office of Federal Administrative Procedure composed of the Director, a justice of the United States Court of Appeals for the District of Columbia designated by its chief justice, and the Director of the Administrative Office of the United States Courts, who shall serve without extra compensation.

(3) The Director shall have authority to appoint, without regard for the provisions of the civil-service laws, an executive secretary and such attorneys, investigators, and experts as are deemed necessary to perform the functions and duties vested in the Director and Office of Federal Administrative Procedure, and he shall fix their compensation according to the Classification Act of 1923, as amended. The Director shall appoint such other employees with regard to existing laws applicable to the appointment and compensation of officers and employees of the United States, as he may from time to time find necessary.

SEC. 106. ADVISORY COMMITTEES.—(1) The Director shall designate from time to time, as occasion requires, the administrative establishments of the United States which are agencies within the meaning of this Act.

(2) Each agency so designated shall from time to time name one of its members or officers to serve as an adviser to the Office of Federal Administrative Procedure and the Director.

(3) From the representatives of the agencies so named the Director shall constitute such advisory committee or committees as he may deem helpful, and may add to them additional officers of the Government or members of the public.

(4) It shall be the duty of each agency promptly to furnish the Director all information which he may request and to assist him by all possible means. The Director, in the performance of his duties, is authorized to utilize, with the consent of any agency, the personnel or facilities of that agency, and may utilize any other uncompensated personal services or facilities.

**SEC. 107. DUTIES OF THE DIRECTOR.—The Director shall—**

(1) Conduct such inquiries into the practices and procedures of the agencies as he may deem necessary, with a view to securing the just and efficient discharge of their respective responsibilities;

(2) Make such recommendations and transmit such information to the agencies as may facilitate the uniform adoption, wherever feasible and appropriate, of those practices, procedures, and methods of organization which have proved most satisfactory;

(3) Receive complaints regarding the procedure of particular agencies, investigate those which appear to be made in good faith, and report thereon to the complainants and to the agency concerned, recommending to the agency any measures which seem to the Director desirable to correct deficiencies;

(4) Examine the practices of the several agencies with respect to the giving of publicity to matters pending before them; and recommend rules to simplify and unify to the fullest practicable extent existing provisions which govern utilization of answers and other pleadings; issuance of subpoenas; taking testimony by deposition; content, cost, and availability of transcripts of records; introduction of documentary evidence; standards of proof; requests for findings of fact; exceptions to findings; oral arguments; and rehearings;

(5) Investigate the admission to practice before the several agencies, in order to determine whether it can be centralized and controlled, with a view to eliminating needless delay and duplication in authorizing members of the bar to appear before agencies; regularizing the circumstances in which others than members of the bar may properly so appear; and developing adequate mechanisms for disciplining or disbarring from further practice before the agencies those whose conduct has shown them to be unworthy;

(6) Perform, with other members of the Office, the duties relating to the appointment and removal of hearing commissioners prescribed by this Act;

(7) On or before the 1st day of December in each year, transmit to the President and the Congress a report of the work of the Office during the past year, together with any recommendations relating to the practices and procedures of the agencies which the Director may deem appropriate. The report shall also record the names and qualifications of all hearing commissioners appointed since the last report, and the circumstances regarding any proceedings for the removal of hearing commissioners.

## **TITLE II—ADMINISTRATIVE RULE-MAKING**

**SEC. 201. RULES AND OTHER INFORMATION REQUIRED TO BE PUBLISHED.—(1) INTERNAL ORGANIZATION AND STRUCTURE.—**Every agency shall promptly make available and currently maintain a statement of its internal organization, insofar as it may affect the public in its dealings with the agency, specifying (a) its officers and types of personnel; (b) its subdivisions; and (c) the places of business or operation, duties, functions, and general authority or jurisdiction of each of the foregoing.

**(2) PUBLICATION OF POLICIES, INTERPRETATIONS, AND RULES.—**All general policies and interpretations of law, where they have been adopted; rules, regulations, and procedures, whether formal or informal; prescribed forms and instructions with respect to reports or other material required to be filed, shall be made available to the public.

**SEC. 202. FORMULATION OF RULES.—**Every agency shall designate one or more units, committees, boards, officers, or employees to receive suggestions and expedite the making, amendment, or revision of rules, subject to the control and supervision of the agency.

**SEC. 203. EFFECTIVE DATE OF RULES.—**No regulation hereafter promulgated by an agency shall take effect until forty-five days after the date of its initial pub-

lication in the Federal Register unless the regulation or the statute by authority of which it is promulgated provides a longer period; but this limitation upon the time when a regulation takes effect may be reduced or eliminated by certification of the agency, published with the regulation in the Federal Register, that stated circumstances require the effective date to be advanced as specified.

**SEC. 204. FORMAL REQUESTS FOR REGULATIONS.**—Any persons may file with an agency a petition requesting the promulgation or amendment of a rule in which the petitioner has an interest. Such petition shall be submitted in such form and with such content as may be prescribed by each agency.

**SEC. 205. REPORTS TO CONGRESS.**—Annually, in its report to Congress or otherwise, each agency shall transmit all rules promulgated by it during the preceding twelve months, together with such explanatory material relating to substance or procedure as may be appropriate. The agency shall also include a summary of formal requests with respect to regulations received by it pursuant to section 204 of this title since its last report, and the reasons for its refusal of such of these requests as may have been refused.

**SEC. 206. TIME OF TAKING EFFECT.**—This title shall take effect thirty days after the date of enactment of this Act.

### TITLE III—ADMINISTRATIVE ADJUDICATION

**SEC. 301. APPLICATION OF TITLE.**—The provisions of sections 302 to 309, inclusive, of this title shall be applicable only to proceedings wherein rights, duties, or other legal relations are required by law to be determined after opportunity for hearing, and, if a hearing be held, only upon the basis of a record made in the course of such hearing. They shall not apply to—

(a) proceedings in which a hearing for the purpose of receiving evidence is held before the agency tribunal, or before one or more individual members of an agency tribunal;

(b) proceedings which, pursuant to a law of the United States, are conducted before an officer of one of the States;

(c) proceedings which precede the issuance of a rule, regulation, or order involving the future governance or control of persons not required by law to be parties to the proceedings;

(d) matters concerning the conduct of the Military or Naval Establishments, or the selection or procurement of men or materials for the armed forces of the United States;

(e) the selection, appointment, promotion, dismissal, discipline, or retirement of an employee or officer of the United States, other than a hearing commissioner as provided hereinafter in this title; or

(f) matters relating to the patent or trade-mark laws.

**SEC. 302. APPOINTMENT AND REMOVAL OF HEARING COMMISSIONERS.**—(1) **HEARING COMMISSIONERS.**—In each agency entrusted with the duty of deciding cases, there shall be appointed such number of officers to be known as "hearing commissioners" as the agency may from time to time find necessary for the proper hearing of cases. In any agency in which five or more hearing commissioners have been appointed, one of their number shall be designated by the agency as the "chief hearing commissioner."

(2) **SALARIES.**—The salary of a hearing commissioner shall be \$7,500 per annum and of a chief hearing commissioner, \$8,500 per annum, and shall be paid from appropriations for salaries and contingent expenses of the agencies to which they may be appointed; but if the Director of Federal Administrative Procedure shall certify, upon application of an agency, that certain of the cases coming before that agency are of an uncomplicated character, it shall be permissible to fix the salaries of hearing commissioners assigned to such cases at \$5,000 per annum, and such hearing commissioners shall be assigned to no other types of cases.

(3) **SELECTION AND APPOINTMENT.**—A hearing commissioner may be selected and appointed without regard for the provisions of the civil service or other laws applicable to the employment and compensation of officers and employees of the United States. He shall be nominated by the agency, and shall be appointed by the Office of Federal Administrative Procedure if that Office finds him to be qualified by training, experience, and character to discharge the responsibilities of the position. The Director is authorized and instructed to make such investigations as may be necessary in order to enable the Office to pass upon the qualifications of nominees.



(4) **BASIS OF NOMINATIONS.**—In the nomination or appointment of hearing commissioners no political test or qualification shall be permitted or given consideration, but all nominations and appointments shall be made on the basis of merit and deficiency alone.

(5) **TERM OF OFFICE.**—Each hearing commissioner shall be appointed for the term of seven years, and shall be removable, within that period, only—

(a) upon charges, first submitted to him, by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty;

(b) upon charges of like effect, first submitted to him, by the Attorney General of the United States, which the Attorney General is authorized to make in his discretion after investigation of any complaint against a hearing commissioner made to him by a person other than the agency; or

(c) upon certification by the Director, after application by the agency, that lack of official business or insufficiency of appropriations renders necessary the termination of the hearing commissioner's appointment.

(6) **REMOVAL.**—(a) If removal of a hearing commissioner is sought on stated charges he may, within five days after service of such charges, demand a hearing upon them before the Office of Federal Administrative Procedure; or, if it so directs, before a trial board consisting of the Director and two other individuals designated by the Office. The decision of the Office or the trial board shall be accompanied by findings of fact based upon a record of the hearing and shall not be subject to review in any other forum.

Pending determination of the trial a hearing commissioner against whom charges have been brought shall be suspended from office. If the office of trial board concludes that cause for removal has been shown the hearing commissioner shall be deemed to have been removed from office as of the date when the charged were served upon him. But if it be concluded that no cause for removal has been shown the hearing commissioner shall at once be restored, unless his term of office has expired, and he shall be paid the salary which would have accrued to him but for the suspension.

(b) If removal of a hearing commissioner is upon certification as provided in paragraph 5, subsection (c), of this section, a hearing commissioner so removed shall be placed upon an eligible list for reappointment and he shall remain upon the list, if he so desires, for the balance of his term of office; and during that period no new appointments of hearing commissioners shall be made in the agency by which he has been employed except from among persons whose names appear on such list.

(7) **PROVISIONAL APPOINTMENT.**—A hearing commissioner may be appointed in the manner provided in paragraphs (3) and (4) of this section for a provisional period not to exceed one year. At the conclusion of the provisional period he shall either be appointed for a full term of seven years or be relieved from further employment as a hearing commissioner in the agency of which he has been a part. During the provisional period he may be removed solely within the discretion of the agency.

(8) **TEMPORARY APPOINTMENT.**—Without reference to the provisions of this section relative to the compensation or tenure of hearing commissioners, the agency may with the approval of the Director designate and assign a temporary commissioner for the purpose of hearing a particular case or, alternatively, for a period not in excess of thirty days, when either—

(a) the volume of cases arising within the agency is so inconsiderable that appointment of a hearing commissioner is not justified; or

(b) because of vacancy in the office of hearing commissioner, insufficiency of available personnel, or other temporary cause the assignment of one or more temporary hearing commissioners is required to permit the expeditious disposition of cases which await hearing or decision.

The assignment of a temporary hearing commissioner may be extended and renewed from time to time for additional periods upon certification, as provided in section 305 of this Act, that the need for such assignment has not terminated and that the public interest will be served by its renewal.

In designating temporary hearing commissioners, an agency shall, so far as feasible, utilize the services of a hearing commissioner attached to another agency, if the consent of that agency is obtained. The salaries of hearing commissioners temporarily assigned from one agency to another shall, during the assignment, be paid by the agency to which they are assigned.

(9) **POWERS OF PROVISIONAL AND TEMPORARY HEARING COMMISSIONERS.**—Provisional and temporary hearing commissioners shall have the powers and perform the duties of hearing commissioners.

**SEC. 303. HEARING OF CASES.**—(1) **HEARING BEFORE HEARING COMMISSIONER.**—Subject to the provisions of this section, every case not within the exceptions stated in section 301 of this Act shall be heard before one or more hearing commissioners.

(2) **WHEN NO HEARING REQUIRED.**—No case in which the facts are agreed need be presented for hearing before or consideration by a hearing commissioner if the agency tribunal otherwise directs.

(3) **DEFAULTS.**—Notwithstanding the provisions of other Acts, no agency shall be required to hold hearings when the parties in interest have failed to answer, if so required, a complaint or other process of like effect duly served upon them, or to appear when notified.

**SEC. 304. POWERS AND DUTIES OF HEARING COMMISSIONER.**—(1) **POWERS AT HEARING.**—A hearing commissioner shall have power—

(a) to administer oaths and affirmations and take affidavits;

(b) to issue subpoenas requiring the attendance and testimony of witnesses and the production of books, contracts, papers, documents, and other evidence;

(c) to examine witnesses and receive evidence;

(d) to cause testimony to be taken by deposition;

(e) to regulate all proceedings in every hearing before him and, subject to the established rules and regulations of the agency tribunal, to do all acts and take all measures necessary for the efficient conduct of the hearing; and

(f) to exclude evidence which is immaterial, irrelevant, unduly repetitious, or not of the sort upon which responsible persons are accustomed to rely in serious affairs.

(2) **DISOBEDIENCE OF LAWFUL ORDER.**—If any person in proceedings before a hearing commissioner disobeys or resists any lawful order or process, or refuses to appear after having been subpoenaed, or upon appearing refuses to take the oath or affirmation as a witness, or thereafter refuses to be examined according to law, the agency of which the hearing commissioner is an officer shall certify the facts to the district court having jurisdiction, which shall thereupon promptly hear the evidence as to the acts complained of, and, if the evidence so warrants, order compliance or punish such person in the same manner and to the same extent as for contempt of the court.

(3) **PREHEARING CONFERENCES.**—In cases referred to him for that purpose, a hearing commissioner shall have power to initiate, conduct, or participate in prehearing proceedings looking toward informal settlement or other disposition of matters in controversy; and he shall have power to direct the parties or their representatives to appear before him for a conference to consider—

(a) the simplification of the issues;

(b) the necessity or desirability of amendments to the pleadings;

(c) the possibility of obtaining stipulations of fact and of documents which will avoid unnecessary proof;

(d) the limitation of the number of expert witnesses; and

(e) such other matters as may aid in the disposition of the case.

(4) **HEARING COMMISSIONER'S DECISION.**—Except as otherwise provided in this Act, when the evidence has been heard by a hearing commissioner opportunity shall be given to the parties in interest to request findings of fact and conclusions of law, and to file briefs or argue orally in accordance with the procedure prescribed by the rules of the agency. The hearing commissioner shall find the facts, formulate the conclusions of law, and enter a decision in the case. Such findings, conclusions, and decision shall be stated in writing, served upon all parties in interest, reported to the agency tribunal, and become part of the record; but in any case wherein he deems it appropriate to do so, the hearing commissioner may announce his decision orally on the record, and shall be required to state his findings, conclusions, and decision more fully and in written form only if requested to do so by a party or by the agency tribunal.

**SEC. 305. POWERS AND DUTIES OF CHIEF HEARING COMMISSIONER.**—(1) **POWER TO HEAR CASES.**—A chief hearing commissioner shall have the powers and duties conferred on hearing commissioners by section 304 of this Act.

(2) **OTHER POWERS AND DUTIES.**—It shall be the duty of the chief hearing commissioner of an agency to—

(a) assign hearing commissioners to cases;

(b) certify to the agency that the accumulation or urgency of cases awaiting hearing or decision is such as to require the designation of one or more temporary hearing commissioners, for the purpose of hearing a named case or such cases within a period of not to exceed thirty days as may be assigned;

(c) certify to the agency that the public interest requires the extension of the designation of a temporary hearing commissioner for such further period, not to exceed thirty days, as may be stated by him, subject to the possibility of subsequent additional extension upon his further certification of continuing necessity;

(d) assign another hearing commissioner to a case in which the hearing commissioner originally assigned is unable to complete the hearing;

(e) direct that the findings of fact, conclusions, and decision in any case be prepared and issued by a hearing commissioner other than the one who presided at the hearing if the latter by reason of death, illness, removal from office, termination of appointment, or unforeseen exigency is unable to prepare the same within a reasonable time: *Provided, however,* That the hearing commissioner to whom such assignment is made may order such reargument or retrial as he may deem necessary to a just decision.

(3) **AGENCIES WHERE NO CHIEF HEARING COMMISSIONER.**—In an agency which has no chief hearing commissioner, the powers and duties assigned to the chief hearing commissioner by paragraph (2) of this section and by section 306 of this Act shall be exercised by the agency tribunal or by an official of the agency designated for that purpose by the agency tribunal.

**SEC. 306. DISQUALIFICATION OF A HEARING COMMISSIONER.**—Any party may file with the chief hearing commissioner a timely affidavit of disqualification of any hearing commissioner assigned to hear any case, setting forth with particularity the grounds of alleged disqualification. After such hearing or investigation as the chief hearing commissioner may deem proper, he shall promptly either find the affidavit without merit and direct the case to proceed as assigned or else assign another hearing commissioner to the case. Where such an affidavit is found to be without merit, the affidavit, any record made thereon, and the memorandum decision and order of the chief hearing commissioner shall be made a part of the record. A hearing commissioner shall withdraw from any case in respect of which he deems himself disqualified for any reason.

**SEC. 307. CASES WHEN NO DECISION BY HEARING COMMISSIONER REQUIRED.**—

(1) **CERTIFICATE OF EXISTENCE OF NOVEL OR COMPLEX QUESTIONS.**—Upon the conclusion of the hearing in any case the hearing commissioner may certify to the agency tribunal any questions or propositions of law concerning which instructions are desired for the proper decision of the case. Thereupon the agency tribunal may either give binding instructions on the questions and propositions certified or may require that the entire record in the case be transmitted to it for consideration and decision.

(2) **TRANSFER OF CASE ON PETITION.**—Upon the conclusion of the hearing in any case the agency tribunal, on petition of any private party therein and for good cause shown, may direct that the entire record in the case be forthwith transmitted to it for consideration and decision.

(3) **OPPORTUNITY TO PRESENT ARGUMENT.**—In any case brought before an agency tribunal pursuant to this section, the parties shall be afforded opportunity to request findings of fact and conclusions of law, and to file briefs or argue orally before the agency tribunal.

**SEC. 308. EFFECT OF DECISION OF HEARING COMMISSIONER.**—(1) **FINALITY WHEN NO APPEAL TAKEN OR REVIEW ORDERED.**—In the absence of timely appeal to the agency tribunal, a decision of a hearing commissioner shall without further proceedings become the final decision of the agency tribunal, and as such enforceable or reviewable to the same extent and in the same manner as though it had been duly entered by the agency tribunal as its decision, judgment, order, award, or other ultimate determination in the case; except that the agency head may on its own motion direct that a decision of a hearing commissioner be reviewed by it after notice to the parties and within such period of time and in accordance with such rules as it may prescribe.

(2) **REOPENING OF HEARING COMMISSIONER'S DECISION.**—To the same extent and in the same manner as may be permissible in respect of its own final decision,

the agency tribunal may reopen and alter, modify, or set aside in whole or in part any decision of a hearing commissioner which has been unappealed and which has become final by operation of time.

**SEC. 309. REVIEW OF HEARING COMMISSIONER'S DECISION BY AGENCY TRIBUNAL.—**

(1) **ASSIGNMENT OF ERRORS ON APPEAL.**—When an appeal is taken to the agency tribunal from the decision of a hearing commissioner, the appellant shall set forth with particularity each error asserted, and only such questions as are specified by the appellant's petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency. Where the appellant asserts that the hearing commissioner's findings of fact are against the weight of the evidence, the agency may limit its consideration of this ground of appeal to the inquiry whether the portions of the record cited disclose that the findings are clearly against the weight of the evidence.

(2) **POWERS OF AGENCY TRIBUNAL ON APPEAL.**—Upon the review of any case the agency tribunal shall afford parties reasonable opportunity for submitting argument. The agency tribunal shall have jurisdiction to remand the case to the hearing commissioner for the purpose of receiving further evidence or making additional findings or to affirm, reverse, modify, or set aside in whole or in part the decision of the hearing commissioner, or itself to make any finding which in its judgment is proper upon the record. But if its findings differ materially from those of the hearing commissioner, the agency tribunal shall file with its decision a statement explaining the grounds of its determinations, with appropriate references to the record.

**SEC. 310. RECORD ON APPEAL TO COURTS.**—In any proceeding for judicial review, restraint, or enforcement of an administrative order or other determination, it shall not be necessary to print the complete record and exhibits in the case unless the court so orders. The moving party shall print as a supplement or appendix to his brief (which may be separately bound) the pertinent pleadings, orders, decisions, opinions, findings, and conclusions of both the agency tribunal and the hearing commissioner, together with relevant docket entries arranged chronologically and such other relevant portions of the record as it is desired that the court shall read. Omissions shall be indicated, reference shall be made to the pages of the typewritten transcript, and the names of witnesses shall be indexed. The responding party shall similarly print such additional portions of the record as it is desired the court shall read. The courts of the United States may by rule amplify or modify the provisions of this section to further its purpose.

**SEC. 311. MISTAKE OF REMEDY NOT TO PRECLUDE JUDICIAL REVIEW.**—When, in a case pending in any United States court to review an order or determination of an agency, the order or determination is subject to judicial review, but by a procedure or before a court different from that chosen by the person seeking review, the court may, instead of denying relief, take one or more of the following courses of action, on such conditions as it may deem just:

(a) proceed, if it has jurisdiction, as if the proper remedy had been sought; or permit or direct such amendment, rehearing, or remand to a lower court as it deems appropriate for a proper review of the order; or

(b) permit transfer of the case to a court having jurisdiction to review the order.

**SEC. 312. TIME OF TAKING EFFECT.**—Sections 310, 311, and 313 of this title shall take effect at once. The remaining sections of this title shall take effect on January 1, 1942, or in any particular agency at any prior date upon order thereof, when such agency shall conclude that available personnel and appropriations permit such provisions, or any portion thereof, to become operative.

**SEC. 313. RULES AND REGULATIONS.**—Each agency shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title.

#### TITLE IV—DECLARATORY RULINGS

**SEC. 401. POWER TO ISSUE RULINGS.**—Each agency tribunal shall have power to issue declaratory rulings concerning rights, status, and other legal relations arising under the statute or the several statutes committed to its administration or arising under its regulations, in order to terminate a controversy or remove an uncertainty. The agency tribunal may refuse to render or enter a declaratory ruling where such ruling if made would not terminate the uncertainty or controversy giving rise to the proceeding, or would itself be of uncertain future application, or is deemed to have been sought for the purpose of delay, or

would impede the determination of other proceedings then pending, or, in the judgment of the agency tribunal, would be premature or otherwise inexpedient.

SEC. 402. EFFECT.—A declaratory ruling issued by an agency tribunal shall, in the absence of reversal after appropriate judicial proceedings, have the same force and effect and be binding in the same manner as a final order or other determination of that agency tribunal.

SEC. 403. PARTIES.—When a declaratory ruling is sought, all persons shall be made parties who have or claim any legal interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

SEC. 404. JUDICIAL REVIEW.—Judicial review of a declaratory ruling made by an agency tribunal may be had in the manner and to the same extent as final orders or other determinations of that agency tribunal; except that this title shall not be deemed to modify existing provisions of law applicable to closing agreements concerning internal-revenue-tax matters. Refusal of a request that a declaratory ruling be made shall not be subject to review in any manner.

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[H. R. 339, 79th Cong., 1st sess.]

A BILL To improve the administration of justice by prescribing fair administrative procedure

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act, divided into sections, subsections, and subparagraphs, may be cited as the "Administrative Procedure Act".

DEFINITIONS

"Agency" means each office, board, commission, independent establishment, authority, corporation, department, bureau, division, institution, service, administration, or other unit of the Federal Government other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. "Rule" means the written statement of any regulation, standard, policy, interpretation, procedure, requirement, or other writing issued or utilized by any agency, of general applicability and designed to implement, interpret, or state the law or policy administered by, or the organization and procedure of, any agency; and "rule making" means the administrative procedure for the formulation of a rule. "Adjudication" means the administrative procedure of any agency, and "order" means its disposition or judgment (whether or not affirmative, negative, or declaratory in form), in a particular instance other than rule making and without distinction between licensing and other forms of administrative action or authority.

PUBLIC INFORMATION

SEC. 2. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) RULES.—Every agency shall separately state and currently publish rules containing (1) description of its complete internal and field organization, together with the general course and method by which each type of matter directly affecting private parties is channeled and determined; (2) substantive regulations authorized by law and adopted by the agency, as well as any statements of general policy or interruptions framed by the agency and of general public application; and (3) the nature and requirements of all formal or informal procedures available to private parties, including instructions and simplified forms respecting the scope and contents of all papers, reports, or examinations. All such rules shall be filed with the Division of the Federal Register and currently published in the Federal Register.

(b) RULINGS AND ORDERS.—Every agency shall preserve and publish or make available to public inspection all general rulings on questions of law and all opinions rendered or orders issued in the course of adjudication, except to the extent (1) required by rule for good cause and expressly authorized by law to be held confidential or (2) relating to the internal management of the agency and not directly affecting the rights of, or procedures available to, the public.

(c) RELEASES.—Except to the extent that their contents are included in the

materials issued or made available pursuant to subsections (a) and (b) of this section, every agency shall, either prior to or upon issuance, file with or register, and mail to the Division of the Federal Register all other releases intended for general public information or of general application or effect; and the Division shall preserve and make all such filings available to public inspection in the same manner as documents published in the Federal Register.

(d) ENFORCEMENT.—No person or party shall be prejudiced in any manner for failure to avail himself of agency organization or procedure not published as required by subsection (a) of this section, or for resort to such organization or procedure. The Comptroller General shall disallow the expenditure of public funds for the maintenance or operation of any agency organization or procedure not published as required by subsection (a).

#### RULE MAKING

SEC. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States, and prior to the issuance of any rule—

(a) NOTICE.—Every agency shall publish general notice of proposed rule making, including (1) a statement of the time, place, and nature of public rule-making procedures; (2) reference to the authority under which the rule is proposed; and (3) a description of the subjects and issues involved; but this subsection shall apply only to substantive rules, shall not be mandatory as to interpretative rules, general statements of policy, or rules of agency organization or administrative procedure, and shall not apply in cases in which notice is impracticable because of unavoidable lack of time or other emergency.

(b) PROCEDURES.—In all cases in which notice of rule making is required pursuant to subsection (a) of this section, the agency shall afford interested parties an adequate opportunity, reflected in its published rules of procedure, to participate in the formulation of the proposed rule or rules through (1) submission of written data or views, (2) attendance at conferences or consultations, or (3) presentation of facts or argument at informal hearings. Parties unable to be present shall be entitled as of right to submit written data or arguments. All relevant matter presented shall be recorded or summarized and given full consideration by the agency. The reasons and conclusions of the agency shall be published upon the issuance or rejection of the rules or proposals involved. Agencies are authorized to adopt procedures in addition to those required by this section, including the promulgation of rules sufficiently in advance of their effective date to permit the submission of criticisms or data by interested parties and consideration and revision or suspension of the rules by the agency. Nothing in this section shall be held to limit or repeal additional requirements imposed by law. In place of the foregoing provisions of this subsection, in all cases in which rules are required by statute to be issued only after a hearing the full hearing and decision requirements of sections 6 and 7 shall apply.

(c) PETITIONS.—Every agency authorized to issue rules shall accord any interested person the right to petition for the issuance, amendment, rescission, or clarification of any rule, in conformity with adequate published procedures for the submission and prompt consideration and disposition of such requests.

#### ADJUDICATION

SEC. 4. In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing—

(a) NOTICE.—In cases in which the agency is the moving party it shall give due and adequate notice in writing specifying (1) the time, place, and nature of relevant administrative proceedings, (2) the particular legal authority and jurisdiction under which the proposed proceeding is to be had, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, the agency or other respondents shall give prompt notice of averments, claims, or issues controverted in fact or law. The statement of issues of fact in the language of statutory standards delegating general authority or jurisdiction to the agency involved shall not be compliance with this subsection.

(b) PROCEDURE.—Prior to the adjudication of any case the agency shall afford all interested parties the right and benefit of fair procedure for the settlement or adjudication of all relevant issues through (1) an adequate opportunity for the informal submission and full consideration of facts, claims, argument, offers of

settlement, or proposals of adjustment; and (2) thereafter, to the extent that the parties are unable to so determine any controversy by consent, full hearing and decision shall be accorded the parties in conformity with sections 6 and 7. In cases in which determinations rest upon physical inspections or tests, opportunity for fair and adequate retest or reinspection by superior officers shall be provided, and thereafter hearing and decision in compliance with sections 6 and 7 shall be made available to the parties. In all instances in which statutes authorize and unavoidable limitations of time or other substantial factors are found to require summary action (whether of an emergency character or whether preliminary, intermediate, or final, and including the issuance of stop orders or their equivalents), no action so taken shall be lawful unless opportunity for informal conference with the agency or with responsible officers thereof shall first have been made available for the prompt adjustment or other fair disposition by consent of all relevant issues of law or fact; and no summary action so taken shall be lawful unless within a reasonable time thereafter the parties shall have been afforded an adequate opportunity for hearing and decision in accordance with sections 6 and 7.

(c) **DECLARATORY ORDERS.**—Every agency shall make and issue declaratory orders to terminate a controversy or to remove uncertainty as to the validity or application of any administrative authority, discretion, rule, or order with the same effect and subject to the same judicial review as in the case of other orders of the agency; but such orders shall be issued only upon the petition of a party in interest, in conformity with the notice and procedure required by this section, and to the extent that the agency is authorized by statute to issue orders after administrative hearing.

#### ANCILLARY MATTERS

SEC. 5. In connection with any administrative rule making adjudication, investigation, or other proceeding or authority—

(a) **APPEARANCE.**—Except as otherwise provided by sections 6 and 7, every agency shall accord every person subject to administrative authority and every party or intervenor (including individuals, partnerships, corporations, associations, or public or private agencies or organizations of any character) in any administrative proceeding or in connection with any administrative authority the right at all reasonable times to appear in person or by counsel before it and its officers or employees, and shall afford such parties so appearing every reasonable opportunity and facility for negotiation, information, adjustment, or formal or informal determination of any issue, request, or controversy. Every person personally appearing or summoned in any administrative proceeding shall be freely accorded the right to be accompanied and advised by counsel. Every person subject to administrative authority or party to any administrative proceeding shall be entitled to a prompt determination of any matter within the jurisdiction of any agency. In fixing the times and places for formal or informal proceedings due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **INVESTIGATIONS.**—No agency shall issue process, make inspections, require reports, or otherwise exercise investigative powers except (1) as expressly authorized by law, (2) within its jurisdiction, (3) where substantially necessary to its operations, (4) through its regularly authorized representatives, (5) without disturbing rights of personal privacy, and (6) in such manner as not to interfere with private occupation or enterprise beyond the requirements of adequate law enforcement. The exercise of such powers or use of any information so acquired for the effectuation of purposes, powers, or policies of any other agency or person shall be unlawful except as expressly authorized by statute.

(c) **SUBPENAS.**—Every agency shall issue subpoenas authorized by law to private parties upon request. Upon contest of the validity of any administrative subpoena or upon the attempted enforcement thereof, the court which would have jurisdiction under section 9 hereof shall determine all questions of law raised by the parties, including the authority or jurisdiction of the agency in law or fact, whether or not the compliance would be unreasonable or oppressive, and shall enforce (by the issuance of a judicial order requiring the future production of evidence under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

(d) **DENIALS.**—Every agency shall give prompt notice of the denial, in whole or in part, of any application, petition, or other request of any private party. Such notice shall be accompanied by a statement of the grounds for such denial and any further administrative procedures available to such party.

(e) **RETROACTIVITY.**—No rule or order shall be retroactive or effective prior to its publication or service unless such effect is both expressly authorized by law and required for good cause. Such required publication or service shall precede for a reasonable time the effective date of the rule or order.

(f) **RECORDS.**—Upon proper request matters of official record shall be made available to all interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

(g) **ATTORNEYS.**—No agency shall impose requirements for the admission of attorneys to practice before it or its officers or employees; and attorneys in good standing admitted to practice in the highest court of any State or other place within the jurisdiction of the United States or in any Federal court shall, upon their oral or written representation to that effect, forthwith be admitted to such practice. No agency shall debar or suspend any such attorney from such practice except for violation of law, and such action shall be subject to judicial review de novo upon the law and the facts.

#### HEARINGS

SEC. 6. No administrative procedure shall satisfy the requirements of a full hearing pursuant to section 3 or 4 unless—

(a) **PRESIDING OFFICERS.**—(1) The case shall be heard by Commissioners or Deputy Commissioners appointed as provided herein, except where statutes authorize action by representatives of parties or organizations of parties. In the event hearing or deciding officers are no longer in office or are unavailable because of death, illness, or suspension, other such officers may be substituted in the sound discretion of the Commissioners at any stage of proceedings required by this section and section 7.

(2) The functions of all hearing officers, as well as of those participating in decisions in conformity with section 7, shall be conducted in an impartial manner, in accord with the requirements of this Act, with due regard for the rights of all parties, and consistent with the orderly and prompt dispatch of proceedings. Such officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, any party directly or indirectly except upon opportunity for all other parties to be present and in accord with the public procedures authorized by this section and section 7. Copies of all communications with such officers shall be served upon all the parties. Upon the filing of a timely affidavit by any party in interest, of personal bias or disqualification or conduct contrary to law, of any such officer at any stage of proceedings, another Commissioner or Deputy Commissioner, after hearing the facts, shall make findings, conclusions, and a decision as to such disqualification which shall become a part of the record in the case and be reviewable in conformity with section 9 and subsection (c) of section 7.

(3) By and with the advice and consent of the Senate, there shall be appointed by the President three Commissioners, at an annual salary of \$10,000, who shall not be removable except for good cause shown, may annually designate one of their number as the presiding Commissioner, and shall hold office for terms of twelve years except that the first three appointments shall be for four, eight, and twelve years, respectively, and any unexpired term shall be filled upon appointment for the unexpired portion only.

(4) Without regard to the civil-service laws or the Classification Act, the Commissioners shall appoint, in lieu of examiners now employed by agencies for the performance of functions subject to this section and section 7, as many duly qualified and competent Deputy Commissioners as may from time to time be necessary for the hearing or decision of cases, who shall perform no other duties, shall be removable only after hearing and for good cause shown, and shall receive a fixed salary not subject to change except that the Commissioners shall survey and adjust such salaries within minimum and maximum limits of \$3,000 and \$9,000, respectively, in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed.

(5) The Commissioners shall hear and decide cases or assign Deputy Commissioners to such duties in accordance with such rules as they may adopt and publish in conformity with this Act, make such appointments and provide such clerical assistance and facilities as may be necessary to the functions assigned by this Act, and submit full annual reports to Congress in addition to such special



reports or recommendations from time to time as they deem advisable. There is authorized to be appropriated such funds as may be necessary for the purposes of this section.

(c) **HEARING POWERS.**—Officers presiding at hearings shall have power, in accordance with the published rules of the agency so far as not inconsistent with this Act or with the rules promulgated by the Commissioners provided in subsection (a) of this section, to (1) administer oaths and affirmations; (2) issue such subpoenas as may be authorized by law; (3) rule upon offers of proof and receive relevant oral or documentary evidence; (4) take or cause depositions to be taken whenever the ends of justice would be served thereby; (5) regulate the course of the hearing or the conduct of the parties; (6) hold informal conferences for the settlement or simplification of the issues by consent of the parties; (7) dispose of procedural motions, requests for adjournment, and similar matters; and (8) make or participate in decisions in conformity with section 7.

(d) **EVIDENCE.**—No sanction, prohibition, or requirement shall be imposed or grant, permission, or benefit withheld in whole or in part except upon relevant evidence which on the whole record shall be competent, credible, and substantial. The rules of evidence recognized in judicial proceedings conducted without a jury shall govern the proof, decision, and administrative or judicial review of all questions of fact. The character and conduct of every person or enterprise shall be presumed lawful until the contrary shall have been shown by competent evidence. Whenever the burden of proof is upon private parties to show right or entitlement to privileges, permits, benefits, or statutory exceptions, their competent evidence (other than opinions or conclusions) to that effect shall be presumed true unless discredited or contradicted by other competent evidence. Every party shall have the right of cross-examination and the submission of rebuttal evidence in open hearing, except that any agency may adopt procedures for the disposition of contested matters in whole or in part upon the submission of sworn statements or written evidence subject to opportunity for such cross-examination or rebuttal. The taking of official notice as to facts beyond the proof adduced in conformity with this section shall be unlawful unless of a matter of generally recognized or scientific knowledge of established character and unless the parties shall both be notified (either upon the record or in reports, findings, or decisions) of the specific facts so noticed and accorded an adequate opportunity to show the contrary by evidence.

(e) **RECORD.**—The transcript of testimony adduced and exhibits admitted in conformity with this section, together with all pleadings, exceptions, motions, requests, and papers filed by the parties, other than separately presented briefs or arguments of law, shall constitute the complete and exclusive record and be made available to all the parties.

#### DECISIONS

SEC. 7. In all cases in which an administrative hearing is required to be conducted in conformity with section 6—

(a) **INITIAL SUBMISSION.**—At the conclusion of the reception of evidence, the officer or officers who presided shall afford the parties adequate opportunity for the submission of briefs, proposed findings and conclusions, and oral argument.

(b) **DECISION.**—After the initial submission pursuant to subsection (a) of this section, the officer or officers who heard the evidence shall find all the relevant facts and enter an appropriate order, award, judgment, or other form of determination. In the absence (within such reasonable time as it may prescribe by general rule) of either an appeal to the agency (upon such specification of errors as it may require by general rule) or review upon the agency's own motion and specification of issues, such decisions shall without further proceedings become final determinations and be effective, enforceable, and subject to judicial review pursuant to section 9 to the same extent and in the same manner as though duly heard, decided, and entered by the agency itself.

(c) **AGENCY REVIEW.**—Upon appeal to the agency from the decisions provided in subsection (b) of this section, the highest authority in the agency shall (1) afford the parties due notice of the specific issues to be reviewed, (2) provide an adequate opportunity for the presentation of briefs, proposed findings and conclusions, and oral argument by the parties, and (3) affirm, reverse, modify, change, alter, amend, remand, or set aside in whole or in part such decision; but the failure of the parties to seek, or of the agency to require, such review

shall not affect the right of judicial review pursuant to section 9. Such review by the agency shall be confined to matters of law and administrative discretion.

(d) **CONSIDERATIONS OF CASES.**—All issues of fact shall be considered and determined exclusively upon the record required to be made in conformity with section 6. In the decision of any case initially or upon review by the agency, all hearing, deciding, or reviewing officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties; and no such officer, clerk, or assistant shall consult with or receive oral or written comment, advice, data, or recommendations respecting any such case from other officers or employees of the agency or from third parties.

(e) **FINDINGS AND OPINIONS.**—All final decisions and determinations, whether initially or upon review by the ultimate authority within the agency, shall be stated in writing and accompanied by a statement of reasons, findings of fact, and conclusions of law upon all relevant issues raised including matters of administrative discretion as well as of law or fact. The findings, conclusions, and stated reasons shall encompass all relevant facts of record and shall themselves be relevant to, and adequate support, the decision and order or award entered.

(f) **SERVICE.**—All administrative findings, conclusions, opinions, or statements of reasons, rules, or orders required to be made in conformity with this section shall be served upon all the parties and intervenors or other participants in the proceeding as well as upon all persons whose attempted intervention or participation has been denied and all interested persons who request in writing to be so notified.

#### PENALTIES AND BENEFITS

**SEC. 8.** In addition to all other limitations or requirements provided by law—

(a) **LIMITATIONS.**—No agency shall by order, rule, or other act (1) impose or grant any form of sanction or relief not specified by statute and within the jurisdiction expressly delegated to the agency by law; (2) withhold relief in derogation of private right or statutory entitlement; or (3) impose sanctions inapplicable to the factual situation presented in any case. Sanction or relief includes, but is not limited to, the imposition, withholding, grant, denial, suspension, withdrawal, revocation, or annulment, as the case may be, of any form of privilege, license, permission, remedy, benefit, assistance, prohibition, requirement, limitation, penalty, fine, taking or seizure of private property, or assessment of damages, costs, charges, or fees. The exercise, or attempted exercise, of implied powers by any agency to make substantive rules, adjudicate cases, or impose penalties or requirements or withhold benefits is unlawful for any purpose.

(b) **LICENSES.**—In addition to the requirements of subsection (a) of this section, (1) in any case, except financial reorganization, in which an administrative license (including permit, certificate, approval, registration, charter, membership, or other form of permission) is required by law and due request is made therefor such license shall be deemed granted in full to the extent of the authority of the agency unless the agency shall within not more than sixty days of such application have made its decision or set the matter for formal proceedings required to be conducted pursuant to sections 6 and 7 of this Act; (2) except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety require otherwise, no withdrawal, suspension, revocation, or annulment of any such license shall be lawful unless, prior to the institution of administrative proceedings therefor, any facts or conduct of which the agency has notice and which may warrant such action shall have been called to the attention of the licensee in writing and such person shall have been accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements; (3) no such license with reference to any business, occupation, or activity of a continuing nature shall expire, in any case in which the holder thereof has made due and timely application for a renewal or a new license, until such application shall have been finally determined by the agency concerned.

(c) **PUBLICITY.**—Except as expressly authorized by law, no agency shall, directly or indirectly, issue publicity reflecting adversely upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction.

## JUDICIAL REVIEW

SEC. 9. In connection with any Act, rule, order, process, or proceeding of any agency—

(a) **RIGHT OF REVIEW.**—Any party adversely affected shall be entitled to judicial review of any issue of law in accordance with this section; and every reviewing court shall have plenary authority to render such decision and grant such relief as right and justice may demand in conformity with law and this Act.

(b) **FORM OF ACTION.**—In addition to judicial review incident to proceedings for any form of criminal or civil enforcement of administrative rules, orders, or process, the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter or, in the absence or inadequacy thereof, any applicable form of legal action including actions for declaratory judgments or writs of injunction or habeas corpus. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure with or without prior resort to the issuing agency, secure a judicial declaration of rights respecting the validity or application of any administrative act, rule, or order. Except as otherwise provided in connection with special statutory review proceedings, any action for judicial review may be brought against one or more of the following: (1) The agency in its official title at the time of the filing of the proceeding; (2) the officer who is the head of, or one or more of the officers comprising the highest authority in, the agency; or (3) any one or more officers acting in the manner challenged or enforcing or authorized to enforce the rule or order involved.

(c) **COURTS AND VENUE.**—The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district, and division where the party seeking court review or any one of them resides or has his principal place of business or in case such party is a corporation then where it has its principal place of business or engages in business. Whenever a court shall hold that it is without jurisdiction on the ground that application should have been made to some other court, it shall transmit the pleadings and other papers to a court having jurisdiction which shall, after permitting any necessary amendments, thereupon proceed as in other cases and as though the proceeding had originally been filed therein. In any case in which application for such review is filed, timely amendments shall be permitted to state additional or subsequent facts and seek additional remedies or relief. Any court having jurisdiction of any part of any controversy regarding any administrative action, rule, or order shall have full jurisdiction over all issues in such controversy, with authority to grant all pertinent relief, notwithstanding that some other court may have jurisdiction of some of the issues or parties. The court review herein provided shall be commenced by the complaining party filing in the office of the clerk of the district court having jurisdiction a written complaint or petition setting forth the grounds of complaint and the relief sought. Service of process shall be had and completed by sending by registered mail a true copy of the complaint or petition to the Attorney General of the United States, or to any Assistant Attorney General of the United States at Washington, District of Columbia, and thereupon the cause, except as herein otherwise provided, shall be proceeded with in conformity with the applicable "Rules of Civil Procedure for the District Courts of the United States."

(d) **REVIEWABLE ACTS.**—Any rule shall be reviewable as provided in this section upon its judicial or administrative application or threatened application to any person, situation, or subject; and, whether or not declaratory or negative in form or substance, any administrative act or order directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land, except to the extent that any matter of fact is both substantially in dispute and expressly committed by law to absolute executive discretion, shall be subject to review pursuant to this section; but only final actions, rules, or orders, or those for which there is no other adequate judicial remedy (including the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time), shall be subject to such review; any preliminary or inter-

mediate act or order not directly reviewable shall be subject to review upon the review of final acts, rules, or orders; and any action, rule, or order shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening, or declaratory order has been presented to or ruled upon by the agency involved.

(e) **INTERIM RELIEF.**—Unless the agency of its own motion or on request shall, as hereby authorized, postpone the effective date of any action, rule, or order pending judicial review, every reviewing court, and every court to which a case may be taken on appeal from, or upon application for certiorari or other writ to, a reviewing court, shall have full authority to issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review and determination as provided in this section; and any such court shall postpone the effective date of any administrative action, rule, or order to the extent necessary to accord the parties a fair opportunity for judicial review of any substantial question of law. Whenever any legal right, privilege, immunity, permission, relief, or benefit expires or is denied, withdrawn, or withheld, in whole or in part, statutes conferring administrative authority in the premises shall be construed, to the extent that such courts so order, to grant or extend the relief requested so far as necessary to preserve the status of the parties or permit just determination and full relief pursuant to this section.

(f) **SCOPE OF REVIEW.**—With reference to any action or the application, threatened application, or terms of any rule or order and notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement, the reviewing court shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions of law arising upon the whole record or such parts thereof as may be cited by any of the parties. Upon such review, the court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of or without lawful authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of procedures required by law; (5) unsupported by competent, material, convincing, and substantial evidence, upon the whole record as reviewed by the court, in any case in which the action, rule, or order is required by statute to be taken, made, or issued after administrative hearing; or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The court shall interpret and determine the applicability of any administrative rule or order. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which administrative adjudications are not required by statute to be made upon administrative hearing, and in any case such court shall try and determine de novo the facts as to the failure of any agency or agent thereof to comply with the provisions of this Act. Except as to compromises or settlements freely entered, no contract or other agreement shall be held to diminish the right or scope of review provided by this section.

(g) **APPELLATE REVIEW.**—The judgment of any court of review shall be appealable in accordance with existing provisions of law and, in any case in which there is no appeal thereto as of right and probable ground appears that any person has been denied the full benefit of this Act, reviewable by the Supreme Court on writ of certiorari.

(h) **OTHER PROVISIONS OF LAW.**—All provisions or additional requirements of law applicable to the judicial review of acts, rules, or orders generally or of particular agencies or subject matter, except as the same may be inconsistent with the provisions of this Act, shall remain valid and binding as shall all statutory provisions expressly precluding judicial review of any agency or function or prescribing a broader scope of review than that provided in this Act.

#### SEPARATION OF FUNCTIONS

SEC. 10. No proceeding, rule, or order subject to the requirements of sections 6 and 7 shall be lawful unless with reference to that type of proceeding the agency involved shall have previously and completely delegated either to one or more of its responsible officers or to one or more of its members all investigative and

prosecuting functions (over which the agency or its remaining membership shall thereafter have exercised no control or supervision) and the officers or members so designated shall have had no part in the decision or review of such cases; and, in any agency in which the ultimate authority so subject to sections 6 and 7 is vested in one person, such individual shall wholly delegate such investigating and prosecuting functions to responsible officers. In any complaint or similar paper the agency may appear in name as the moving party; and nothing in this section shall be taken to prevent the supervision, consideration, or acceptance of settlements or adjustments by hearing or deciding officers. Every general delegation and separation of functions required of any agency by this section shall be specifically provided in its rules published pursuant to section 2.

#### CONSTRUCTION AND EFFECT

SEC. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise expressly authorized or required by law, all rules, requirements, limitations, rights, privileges, and precedents relating to evidence or procedure shall apply equally to public agencies and private parties. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is hereby granted all necessary authority to comply with the requirements of this Act; and no subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 6 and 7 shall take effect six months after such approval. In any agency examiners authorized by law may exercise the functions of commissioners or deputy commissioners provided by subsection (a) of section 6 until one year after the termination of the present hostilities, and no procedural requirement of this Act shall be mandatory as to any administrative proceeding formally initiated or completed prior to the effective date of such requirement.

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[H. R. 1117, 79th Cong., 1st sess.]

A BILL To improve the administration of justice by prescribing fair administrative procedure

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act, divided into sections, subsections, and subparagraphs, may be cited as the "Administrative Procedure Act".

#### DEFINITIONS

"Agency" means each office, board, commission, independent establishment, authority, corporation, department, bureau, division, institution, service, administration, or other unit of the Federal Government other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. "Rule" means the written statement of any regulation, standard, policy, interpretation, procedure, requirement, or other writing issued or utilized by any agency, of general applicability and designed to implement, interpret, or state the law or policy administered by, or the organization and procedure of, any agency; and "rule making" means the administrative procedure for the formulation of a rule. "Adjudication" means the administrative procedure of any agency, and "order" means its disposition or judgment (whether or not affirmative, negative, or declaratory in form), in a particular instance other than rule making and without distinction between licensing and other forms of administrative action or authority.

#### PUBLIC INFORMATION

SEC. 2. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) RULES.—Every agency shall separately state and currently publish rules containing (1) descriptions of its complete internal and field organization, together with the general course and method by which each type of matter directly

affecting private parties is channeled and determined; (2) substantive regulations authorized by law and adopted by the agency, as well as any statements of general policy or interpretations framed by the agency and of general public application; and (3) the nature and requirements of all formal or informal procedures available to private parties, including instructions and simplified forms respecting the scope and contents of all papers, reports, or examinations. All such rules shall be filed with the Division of the Federal Register and currently published in the Federal Register.

(b) **RULINGS AND ORDERS.**—Every agency shall preserve and publish or make available to public inspection all general rulings on questions of law and all opinions rendered or orders issued in the course of adjudication, except to the extent (1) required by rule for good cause and expressly authorized by law to be held confidential or (2) relating to the internal management of the agency and not directly affecting the rights of, or procedures available to, the public.

(c) **RELEASES.**—Except to the extent that their contents are included in the materials issued or made available pursuant to subsections (a) and (b) of this section, every agency shall, either prior to or upon issuance, file with or register and mail to the division of the Federal Register all other releases intended for general public information or of general application or effect; and the Division shall preserve and make all such filings available to public inspection in the same manner as documents published in the Federal Register.

(d) **ENFORCEMENT.**—No person or party shall be prejudiced in any manner for failure to avail himself of agency organization or procedure not published as required by subsection (a) of this section, or for resort to such organization or procedure. The Comptroller General shall disallow the expenditure of public funds for the maintenance or operation of any agency organization or procedure not published as required by subsection (a).

#### RULE MAKING

Sec. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States, and prior to the issuance of any rule—

(a) **NOTICE.**—Every agency shall publish general notice of proposed rule making, including (1) a statement of the time, place, and nature of public rule-making procedures; (2) reference to the authority under which the rule is proposed; and (3) a description of the subjects and issues involved; but this subsection shall apply only to substantive rules, shall not be mandatory as to interpretative rules, general statements of policy, or rules of agency organization or administrative procedure, and shall not apply in cases in which notice is impracticable because of unavoidable lack of time or other emergency.

(b) **PROCEDURES.**—In all cases in which notice of rule making is required pursuant to subsection (a) of this section, the agency shall afford interested parties an adequate opportunity, reflected in its published rules of procedure, to participate in the formulation of the proposed rule or rules through (1) submission of written data or views, (2) attendance at conferences or consultations, or (3) presentation of facts or argument at informal hearings. Parties unable to be present shall be entitled as of right to submit written data or arguments. All relevant matter presented shall be recorded or summarized and given full consideration by the agency. The reasons and conclusions of the agency shall be published upon the issuance or rejection of the rules or proposals involved. Agencies are authorized to adopt procedures in addition to those required by this section, including the promulgation of rules sufficient in advance of their effective date to permit the submission of criticisms or data by interested parties and consideration and revision or suspension of the rules by the agency. Nothing in this section shall be held to limit or repeal additional requirements imposed by law. In place of the foregoing provisions of this subsection, in all cases in which rules are required by statute to be issued only after a hearing the full hearing and decision requirements of sections 6 and 7 shall apply.

(c) **PETITIONS.**—Every agency authorized to issue rules shall accord any interested person the right to petition for the issuance, amendment, rescission, or clarification of any rule, in conformity with adequate published procedures for the submission and prompt consideration and disposition of such requests.

## ADJUDICATION

SEC. 4. In every administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing—

(a) NOTICE.—In cases in which the agency is the moving party it shall give due and adequate notice in writing, specifying (1) the time, place, and nature of relevant administrative proceedings, (2) the particular legal authority and jurisdiction under which the proposed proceeding is to be had, and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, the agency or other respondents shall give prompt notice of averments, claims, or issues controverted in fact or law. The statement of issues of fact in the language of statutory standards delegating general authority or jurisdiction to the agency involved shall not be compliance with this subsection.

(b) PROCEDURE.—Prior to the adjudication of any case, the agency shall afford all interested parties the right and benefit of fair procedure for the settlement or adjudication of all relevant issues through (1) an adequate opportunity for the informal submission and full consideration of facts, claims, argument, offers of settlement, or proposals of adjustment; and (2) thereafter, to the extent that the parties are unable to so determine any controversy by consent, full hearing and decision shall be accorded the parties in conformity with sections 6 and 7. In cases in which determinations rest upon physical inspections or tests, opportunity for fair and adequate retest or reinspection by superior officers shall be provided, and thereafter hearing and decision in compliance with sections 6 and 7 shall be made available to the parties. In all instances in which statutes authorize and unavoidable limitations of time or other substantial factors are found to require summary action (whether of an emergency character or whether preliminary, intermediate, or final, and including the issuance of stop orders or their equivalents), no action so taken shall be lawful unless opportunity for informal conference with the agency or with responsible officers thereof shall first have been made available for the prompt adjustment or other fair disposition by consent of all relevant issues of law or fact; and no summary action so taken shall be lawful unless within a reasonable time thereafter the parties shall have been afforded an adequate opportunity for hearing and decision in accordance with sections 6 and 7.

(c) DECLARATORY ORDERS.—Every agency shall make and issue declaratory orders to terminate a controversy or to remove uncertainty as to the validity or application of any administrative authority, discretion, rule, or order with the same effect and subject to the same judicial review as in the case of other orders of the agency; but such orders shall be issued only upon the petition of a party in interest, in conformity with the notice and procedure required by this section; and to the extent that the agency is authorized by statute to issue orders after administrative hearing.

## ANCILLARY MATTERS

SEC. 5. In connection with any administrative rule making adjudication, investigation, or other proceeding or authority—

(a) APPEARANCE.—Except as otherwise provided by sections 6 and 7, every agency shall accord every person subject to administrative authority and every party or intervenor (including individuals, partnerships, corporations, associations, or public or private agencies or organizations of any character) in any administrative proceeding or in connection with any administrative authority the right at all reasonable times to appear in person or by counsel before it and its officers or employees, and shall afford such parties so appearing every reasonable opportunity and facility for negotiation, information, adjustment, or formal or informal determination of any issue, request, or controversy. Every person personally appearing or summoned in any administrative proceeding shall be freely accorded the right to be accompanied and advised by counsel. Every person subject to administrative authority or party to any administrative proceeding shall be entitled to a prompt determination of any matter within the jurisdiction of any agency. In fixing the times and places for formal or informal proceedings due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **INVESTIGATIONS.**—No agency shall issue process, make inspections, require reports, or otherwise exercise investigative powers except (1) as expressly authorized by law, (2) within its jurisdiction, (3) where substantially necessary to its operations, (4) through its regularly authorized representatives, (5) without disturbing rights of personal privacy, and (6) in such manner as not to interfere with private occupation or enterprise beyond the requirements of adequate law enforcement. The exercise of such powers or use of any information so acquired for the effectuation of purposes, powers, or policies of any other agency or person shall be unlawful except as expressly authorized by statute.

(c) **SUBPENAS.**—Every agency shall issue subpoenas authorized by law to private parties upon request. Upon contest of the validity of any administrative subpoena or upon the attempted enforcement thereof, the court which would have jurisdiction under section 9 hereof shall determine all questions of law raised by the parties, including the authority or jurisdiction of the agency in law or fact, whether or not the compliance would be unreasonable or oppressive, and shall enforce (by the issuance of a judicial order requiring the future production of evidence under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

(d) **DENIALS.**—Every agency shall give prompt notice of the denial, in whole or in part, of any application, petition, or other request of any private party. Such notice shall be accompanied by a statement of the grounds for such denial and any further administrative procedures available to such party.

(e) **RETROACTIVITY.**—No rule or order shall be retroactive or effective prior to its publication or service unless such effect is both expressly authorized by law and required for good cause. Such required publication or service shall precede for a reasonable time the effective date of the rule or order.

(f) **RECORDS.**—Upon proper request matters of official record shall be made available to all interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

(g) **ATTORNEYS.**—No agency shall impose requirements for the admission of attorneys to practice before it or its officers or employees; and attorneys in good standing admitted to practice in the highest court of any State or other place within the jurisdiction of the United States or in any Federal court shall, upon their oral or written representation to that effect, forthwith be admitted to such practice. No agency shall debar or suspend any such attorney from such practice except for violation of law, and such action shall be subject to judicial review de novo upon the law and the facts.

#### HEARINGS

SEC. 6. No administrative procedure shall satisfy the requirements of a full hearing pursuant to section 3 or 4 unless—

(a) **PRESIDING OFFICERS.**—(1) The case shall be heard by Commissioners or Deputy Commissioners appointed as provided herein, except where statutes authorize action by representatives of parties or organizations of parties. In the event hearing or deciding officers are no longer in office or are unavailable because of death, illness, or suspension, other such officers may be substituted in the sound discretion of the Commissioners at any stage of proceedings required by this section and section 7.

(2) The functions of all hearing officers, as well as of those participating in decisions in conformity with section 7, shall be conducted in an impartial manner, in accord with the requirements of this Act, with due regard for the rights of all parties, and consistent with the orderly and prompt dispatch of proceedings. Such officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, any party directly or indirectly except upon opportunity for all other parties to be present and in accord with the public procedures authorized by this section and section 7. Copies of all communications with such officers shall be served upon all the parties. Upon the filing of a timely affidavit by any party in interest, of personal bias or disqualification or conduct contrary to law of any such officer at any stage of proceedings, another Commissioner or Deputy Commissioner, after hearing the facts shall make findings, conclusions, and a decision as to such disqualification which shall become a part of the record in



the case and be reviewable in conformity with section 9 and subsection (c) of section 7.

(3) By and with the advice and consent of the Senate, there shall be appointed by the President three Commissioners, at an annual salary of \$10,000, who shall not be removable except for good cause shown, may annually designate one of their number as the presiding Commissioner, and shall hold office for terms of twelve years except that the first three appointments shall be for four, eight, and twelve years, respectively, and any unexpired term shall be filled upon appointment for the unexpired portion only.

(4) Without regard to the civil-service laws or the Classification Act, the Commissioners shall appoint, in lieu of examiners now employed by agencies for the performance of functions subject to this section and section 7, as many duly qualified and competent Deputy Commissioners as may from time to time be necessary for the hearing or decision of cases, who shall perform no other duties, shall be removable only after hearing and for good cause shown, and shall receive a fixed salary not subject to change except that the Commissioners shall survey and adjust such salaries within minimum and maximum limits of \$3,000 and \$9,000, respectively, in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed.

(5) The Commissioners shall hear and decide cases or assign Deputy Commissioners to such duties in accordance with such rules as they may adopt and publish in conformity with this Act, make such appointments and provide such clerical assistance and facilities as may be necessary to the functions assigned by this Act, and submit full annual reports to Congress in addition to such special reports or recommendations from time to time as they deem advisable. There is authorized to be appropriated such funds as may be necessary for the purposes of this section.

(c) HEARING POWERS.—Officers presiding at hearings shall have power, in accordance with the published rules of the agency so far as not inconsistent with this Act or with the rules promulgated by the Commissioners provided in subsection (a) of this section, to (1) administer oaths and affirmations; (2) issue such subpoenas as may be authorized by law; (3) rule upon offers of proof and receive relevant oral or documentary evidence; (4) take or cause depositions to be taken whenever the ends of justice would be served thereby; (5) regulate the course of the hearing or the conduct of the parties; (6) hold informal conferences for the settlement or simplification of the issues by consent of the parties; (7) dispose of procedural motions, requests for adjournment, and similar matters; and (8) make or participate in decisions in conformity with section 7.

(d) EVIDENCE.—No sanction, prohibition, or requirement shall be imposed or grant, permission, or benefit withheld in whole or in part except upon relevant evidence which on the whole record shall be competent, credible, and substantial. The rules of evidence recognized in judicial proceedings conducted without a jury shall govern the proof, decision, and administrative or judicial review of all questions of fact. The character and conduct of every person or enterprise shall be presumed lawful until the contrary shall have been shown by competent evidence. Whenever the burden of proof is upon private parties to show right or entitlement to privileges, permits, benefits, or statutory exceptions, their competent evidence (other than opinions or conclusions) to that effect shall be presumed true unless discredited or contradicted by other competent evidence. Every party shall have the right of cross-examination and the submission of rebuttal evidence in open hearing, except that any agency may adopt procedures for the disposition of contested matters in whole or in part upon the submission of sworn statements or written evidence subject to opportunity for such cross-examination or rebuttal. The taking of official notice as to facts beyond the proof adduced in conformity with this section shall be unlawful unless of a matter of generally recognized or scientific knowledge of established character and unless the parties shall both be notified (either upon the record or in reports, findings, or decisions) of the specific facts so noticed and accorded an adequate opportunity to show the contrary by evidence.

(e) RECORD.—The transcript of testimony adduced and exhibits admitted in conformity with this section, together with all pleadings, exceptions, motions, requests, and papers filed by the parties, other than separately presented briefs or arguments of law, shall constitute the complete and exclusive record and be made available to all the parties.

## DECISIONS

SEC. 7. In all cases in which an administrative hearing is required to be conducted in conformity with section 6—

(a) **INITIAL SUBMISSION.**—At the conclusion of the reception of evidence, the officer or officers who presided shall afford the parties adequate opportunity for the submission of briefs, proposed findings and conclusions, and oral argument.

(b) **DECISION.**—After the initial submission pursuant to subsection (a) of this section, the officer or officers who heard the evidence shall find all the relevant facts and enter an appropriate order, award, judgment, or other form of determination. In the absence (within such reasonable time as it may prescribe by general rule) of either an appeal to the agency (upon such specification of errors as it may require by general rule) or review upon the agency's own motion and specification of issues, such decisions shall without further proceedings become final determinations and be effective, enforceable, and subject to judicial review pursuant to section 9 to the same extent and in the same manner as though duly heard, decided, and entered by the agency itself.

(c) **AGENCY REVIEW.**—Upon appeal to the agency from the decisions provided in subsection (b) of this section, the highest authority in the agency shall (1) afford the parties due notice of the specific issues to be reviewed, (2) provide an adequate opportunity for the presentation of briefs, proposed findings and conclusions, and oral argument by the parties, and (3) affirm, reverse, modify, change, alter, amend, remand, or set aside in whole or in part such decision; but the failure of the parties to seek, or of the agency to require, such review shall not affect the right of judicial review pursuant to section 9. Such review by the agency shall be confined to matters of law and administrative discretion.

(d) **CONSIDERATION OF CASES.**—All issues of fact shall be considered and determined exclusively upon the record required to be made in conformity with section 6. In the decision of any case initially or upon review by the agency, all hearing, deciding, or reviewing officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties; and no such officer, clerk, or assistant shall consult with or receive oral or written comment, advice, data, or recommendations respecting any such case from other officers or employees of the agency or from third parties.

(e) **FINDINGS AND OPINIONS.**—All final decisions and determinations, whether initially or upon review by the ultimate authority within the agency, shall be stated in writing and accompanied by a statement of reasons, findings of fact, and conclusions of law upon all relevant issues raised including matters of administrative discretion as well as of law or fact. The findings, conclusions, and stated reasons shall encompass all relevant facts of record and shall themselves be relevant to, and adequate support, the decision and order or award entered.

(f) **SERVICE.**—All administrative findings, conclusions, opinions, or statements of reasons, rules, or orders, required to be made in conformity with this section shall be served upon all the parties and intervenors or other participants in the proceeding as well as upon all persons whose attempted intervention or participation has been denied and all interested persons who request in writing to be so notified.

## PENALTIES AND BENEFITS

SEC. 8. In addition to all other limitations or requirements provided by law—

(a) **LIMITATIONS.**—No agency shall by order, rule, or other act (1) impose or grant any form of sanction or relief not specified by statute and within the jurisdiction expressly delegated to the agency by law; (2) withhold relief in derogation of private right or statutory entitlement; or (3) impose sanctions inapplicable to the factual situation presented in any case. Sanction or relief includes, but is not limited to, the imposition, withholding, grant, denial, suspension, withdrawal, revocation or annulment, as the case may be, of any form of privilege, license, permission, remedy, benefit, assistance, prohibition, requirement, limitation, penalty, fine, taking or seizure of private property, or assessment of damages, costs, charges, or fees. The exercise, or attempted exercise, of implied powers by any agency to make substantive rules, adjudicate cases, or impose penalties or requirements or withhold benefits is unlawful for any purpose.

(b) **LICENSES.**—In addition to the requirements of subsection (a) of this section, (1) in any case, except financial reorganization, in which an adminis-

trative license (including permit, certificate, approval, registration, charter, membership, or other form of permission) is required by law and due request is made therefor such license shall be deemed granted in full to the extent of the authority of the agency unless the agency shall within not more than sixty days of such application have made its decision or set the matter for formal proceedings required to be conducted pursuant to sections 6 and 7 of this Act; (2) except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety require otherwise, no withdrawal, suspension, revocation, or annulment of any such license shall be lawful unless, prior to the institution of administrative proceedings therefor, any facts or conduct of which the agency has notice and which may warrant such action shall have been called to the attention of the licensee in writing and such person shall have been accorded a reasonable opportunity to demonstrate or achieve compliance with all lawful requirements; (3) no such license with reference to any business, occupation, or activity of a continuing nature shall expire, in any case in which the holder thereof has made due and timely application for a renewal or a new license, until such application shall have been finally determined by the agency concerned.

(c) **PUBLICITY.**—Except as expressly authorized by law, no agency shall, directly or indirectly, issue publicity reflecting adversely upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction.

#### JUDICIAL REVIEW

SEC. 9. In connection with any Act, rule, order, process, or proceeding of any agency—

(a) **RIGHT OF REVIEW.**—Any party adversely affected shall be entitled to judicial review of any issue of law in accordance with this section; and every reviewing court shall have plenary authority to render such decision and grant such relief as right and justice may demand in conformity with law and this Act.

(b) **FORM OF ACTION.**—In addition to judicial review incident to proceedings for any form of criminal or civil enforcement of administrative rules, orders, or process, the form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter or, in the absence or inadequacy thereof, any applicable form of legal action including actions for declaratory judgments or writs of injunction or habeas corpus. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure with or without prior resort to the issuing agency, secure a judicial declaration of rights respecting the validity or application of any administrative act, rule, or order. Except as otherwise provided in connection with special statutory review proceedings, any action for judicial review may be brought against one or more of the following: (1) The agency in its official title at the time of the filing of the proceeding; (2) the officer who is the head of, or one or more of the officers comprising the highest authority in, the agency; or (3) any one or more officers acting in the manner challenged or enforcing or authorized to enforce the rule or order involved.

(c) **COURTS AND VENUE.**—The review guaranteed by this section shall be had upon application to the courts named in statutes especially providing for judicial review or, in the absence or inadequacy thereof, to the district court of the United States (including the District Court of the District of Columbia) in the State, district, and division where the party seeking court review or any one of them resides or has his principal place of business or in case such party is a corporation then where it has its principal place of business or engages in business. Whenever a court shall hold that it is without jurisdiction on the ground that application should have been made to some other court, it shall transmit the pleadings and other papers to a court having jurisdiction which shall, after permitting any necessary amendments, thereupon proceed as in other cases and as though the proceeding had originally been filed therein. In any case in which application for such review is filed, timely amendments shall be permitted to state additional or subsequent facts and seek additional remedies or relief. Any court having jurisdiction of any part of any controversy regarding any administrative action, rule, or order shall have full jurisdiction over all issues in such controversy, with authority to grant all pertinent relief, notwithstanding that

some other court may have jurisdiction of some of the issues or parties. The court review herein provided shall be commenced by the complaining party filing in the office of the clerk of the district court having jurisdiction a written complaint or petition setting forth the grounds of complaint and the relief sought. Service of process shall be had and completed by sending by registered mail a true copy of the complaint or petition to the Attorney General of the United States, or to any Assistant Attorney General of the United States at Washington, District of Columbia, and thereupon the cause, except as herein otherwise provided, shall be proceeded with in conformity with the applicable "Rules of Civil Procedure for the District Courts of the United States."

(d) **REVIEWABLE ACTS.**—Any rule shall be reviewable as provided in this section upon its judicial or administrative application or threatened application to any person, situation, or subject; and, whether or not declaratory or negative in form or substance, any administrative act or order directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land, except to the extent that any matter of fact is both substantially in dispute and expressly committed by law to absolute executive discretion, shall be subject to review pursuant to this section; but only final actions, rules, or orders, or those for which there is no other adequate judicial remedy (including the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time), shall be subject to such review; any preliminary or intermediate act or order not directly reviewable shall be subject to review upon the review of final acts, rules, or orders; and any action, rule, or order shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening, or declaratory order has been presented to or ruled upon by the agency involved.

(e) **INTERIM RELIEF.**—Unless the agency of its own motion or on request shall, as hereby authorized, postpone the effective date of any action, rule, or order pending judicial review, every reviewing court, and every court to which a case may be taken on appeal from, or upon application for certiorari or other writ to, a reviewing court, shall have full authority to issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review and determination as provided in this section; and any such court shall postpone the effective date of any administrative action, rule, or order to the extent necessary to accord the parties a fair opportunity for judicial review of any substantial question of law. Whenever any legal right, privilege, immunity, permission, relief, or benefit expires or is denied, withdrawn, or withheld, in whole or in part, statutes conferring administrative authority in the premises shall be construed, to the extent that such courts: so order, to grant or extend the relief requested so far as necessary to preserve the status of the parties or permit just determination and full relief pursuant to this section.

(f) **SCOPE OF REVIEW.**—With reference to any action or the application, threatened application, or terms of any rule or order and notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement, the reviewing court shall consider and decide so far as necessary to its decision and where raised by the parties, all relevant questions of law arising upon the whole record or such parts thereof as may be cited by any of the parties. Upon such review, the court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of or without lawful authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of procedures required by law; (5) unsupported by competent, material, convincing, and substantial evidence, upon the whole record as reviewed by the court, in any case in which the action, rule, or order is required by statute to be taken, made, or issued after administrative hearing; or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The court shall interpret and determine the applicability of any administrative rule or order. The relevant facts shall be tried and determined de novo by the original court of review in all

cases in which administrative adjudications are not required by statute to be made upon administrative hearing, and in any case such court shall try and determine de novo the facts as to the failure of any agency or agent thereof to comply with the provisions of this Act. Except as to compromises or settlements freely entered, no contract or other agreement shall be held to diminish the right or scope of review provided by this section.

(g) APPELLATE REVIEW.—The judgment of any court of review shall be appealable in accordance with existing provisions of law and, in any case in which there is no appeal thereto as of right and probable ground appears that any person has been denied the full benefit of this Act, reviewable by the Supreme Court on writ of certiorari.

(h) OTHER PROVISIONS OF LAW.—All provisions or additional requirements of law applicable to the judicial review of acts, rules, or orders generally or of particular agencies or subject matter, except as the same may be inconsistent with the provisions of this Act, shall remain valid and binding as shall all statutory provisions expressly precluding judicial review of any agency or function or prescribing a broader scope of review than that provided in this Act.

#### SEPARATION OF FUNCTIONS

SEC. 10. No proceeding, rule, or order subject to the requirements of sections 6 and 7 shall be lawful unless with reference to that type of proceeding the agency involved shall have previously and completely delegated either to one or more of its responsible officers or to one or more of its members all investigative and prosecuting functions (over which the agency or its remaining membership shall thereafter have exercised no control or supervision), and the officers or members so designated shall have had no part in the decision or review of such cases; and, in any agency in which the ultimate authority so subject to sections 6 and 7 is vested in one person, such individual shall wholly delegate such investigating and prosecuting functions to responsible officers. In any complaint or similar paper the agency may appear in name as the moving party; and nothing in this section shall be taken to prevent the supervision, consideration, or acceptance of settlements or adjustments by hearing or deciding officers. Every general delegation and separation of functions required of any agency by this section shall be specifically provided in its rules published pursuant to section 2.

#### CONSTRUCTION AND EFFECT

SEC. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise expressly authorized or required by law, all rules, requirements, limitations, rights, privileges, and precedents relating to evidence or procedure shall apply equally to public agencies and private parties. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is hereby granted all necessary authority to comply with the requirements of this Act; and no subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 6 and 7 shall take effect six months after such approval. In any agency examiners authorized by law may exercise the functions of commissioners or deputy commissioners provided by subsection (a) of section 6 until one year after the termination of the present hostilities, and no procedural requirement of this Act shall be mandatory as to any administrative proceeding formally initiated or completed prior to the effective date of such requirement.

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[H. R. 1203, 79th Cong., 1st sess.]

A BILL To improve the administration of justice by prescribing fair administrative procedure

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Administrative Procedure Act."*

## DEFINITIONS

## SEC. 2. AS used in this Act—

(a) **AGENCY.**—"Agency" means each authority of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and (2) agencies composed of representatives of the parties or of organizations of the parties to the disputes determined by them.

(b) **PERSON AND PARTY.**—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency participating, or properly seeking and entitled to participate, in any agency proceeding or in proceedings for judicial review of any agency action.

(c) **RULE AND RULE MAKING.**—"Rule" means the whole or any part of any agency statement of general applicability designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) **ORDER AND ADJUDICATION.**—"Order" means the whole or any part of the final disposition or judgment (whether or not affirmative, negative, or declaratory in form) of any agency, and "adjudication" means its process, in a particular instance other than rule making but including licensing.

(e) **LICENSE AND LICENSING.**—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, or other form of permission. "Licensing" means agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, or conditioning of a license.

(f) **SANCTION AND RELIEF.**—"Sanction" includes, in whole or part by an agency, any (1) prohibition, requirement, limitation, or other condition upon or deprivation of the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; or (6) requirement of a license or other compulsory or restrictive act. "Relief" includes, in whole or part by an agency, any (1) grant of money, assistance, authority, exemption, privilege, or remedy; (2) recognition of any claim, right, or exception; or (3) taking of other action beneficial to any person.

(g) **AGENCY ACTION.**—For the purposes of section 10, "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof and including in each case the supporting procedures, findings, conclusions, and reasons required by law.

## PUBLIC INFORMATION

SEC. 3. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States requiring secrecy in the public interest—

(a) **RULES.**—Every agency shall separately state and currently publish (1) descriptions of its internal and field organization; (2) a statement of the general course and method by which each type of matter directly affecting any person or party is channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive regulations adopted as authorized by law and statements of general policy or interpretations framed by the agency. No person shall in any manner be held liable or prejudiced for compliance with such rules or for failure to resort to organization or procedure not so published.

(b) **RULINGS AND ORDERS.**—Every agency shall publish or make available to public inspection all generally applicable rulings on questions of law and all final opinions or orders in the adjudication of cases except to the extent (1) not utilized as precedents and required by published rule for good cause to be held confidential or (2) relating to the internal management of the agency and not directly affecting public substantive or procedural privileges, rights, or duties.

## RULE MAKING

SEC. 4. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

(a) NOTICE.—General notice of proposed substantive rule making shall be published, including (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except in cases in which rules are not required by statute to be made after opportunity for agency hearing, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds notice and public procedure thereon impracticable because of unavoidable lack of time or other emergency.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested parties an opportunity to participate in the rule making through submission of written data, views, or argument with or without opportunity to present the same orally in any manner. After consideration of all relevant matter presented the agency shall, upon adoption or rejection of proposals, publish its reasons and conclusions. To the extent that rules are required by law to be made upon the record of an agency hearing, or after opportunity therefor, the requirements of sections 7 and 8 shall apply in place of the prior provisions of this subsection.

(c) PETITIONS.—To the extent that an agency is authorized to issue rules it shall accord any interested person the right to petition for the issuance, amendment, or rescission of a rule.

## ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined after opportunity for an agency hearing, except to the extent that there is directly involved any matter subject to a subsequent trial of the law and the facts de novo in any court—

(a) NOTICE.—Persons entitled to notice shall be informed of (1) the time, place, and nature of agency proceedings; (2) the legal authority and jurisdiction under which the proposed proceedings are to be had; and (3) the matters of fact and law in issue. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law.

(b) PROCEDURE.—The agency shall afford all interested parties opportunity for the settlement or adjudication of relevant issues through (1) the submission and consideration of facts, argument, offers of settlement, or proposals of adjustments and (2) to the extent that the parties are unable to so determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8. The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision pursuant to section 8, except in determining applications for licenses or where such officers become unavailable to the agency.

(c) SEPARATION OF FUNCTIONS.—No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency shall participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not prevent the agency from supervising the issuance of process or similar papers or from appearing thereon as a party.

(d) DECLARATORY ORDERS.—The agency is authorized, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

## ANCILLARY MATTERS

SEC. 6. In connection with any proceeding or authority—

(a) APPEARANCE.—Every interested person shall be accorded the right to appear in person or by counsel or other qualified representative before any agency or its responsible officers or employees to secure information or for the prompt negotiation, adjustment, or determination of any issue, request, or controversy. Every person appearing or summoned in any agency proceeding shall be freely accorded the right to be accompanied and advised by counsel. In fixing the times and places for proceedings, regard shall be had for the convenience and necessity of the parties or their representatives.

(b) **INVESTIGATIONS.**—No process, requirement of a report, demand for inspection, or other investigative act or demand shall be enforceable in any manner or for any purpose except (1) as expressly authorized by law, (2) within the jurisdiction of the agency, (3) without denying rights of personal privilege or personal privilege or privacy, and (4) in furtherance of requirements of law enforcement. Every person required to submit data or evidence shall be entitled to retain or procure a copy or transcript thereof.

(c) **SUBPENAS.**—Subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance, necessity, or reasonable scope of the evidence sought. Upon any contest of the validity of a subpoena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency, and in any proceeding for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in a case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

(d) **DENIALS.**—Prompt notice shall be given of the denial in whole or part of any application, petition, or other request of any person. Such notice shall be accompanied by a reference to any further agency procedure available to such person and, except to the extent affirming prior denial, a simple statement of grounds.

(e) **EFFECTIVE DATES.**—The required publication or service of any substantive and effective rule (other than one granting exemption or relieving restriction) or final and affirmative order (except the grant or renewal of a license) shall precede for not less than thirty days the effective date thereof except as otherwise authorized by law and provided by the agency upon good cause found.

(f) **PUBLIC RECORDS.**—Matters of official record shall be available to interested persons except personal data, information required by law to be held confidential, or, for good cause found and upon published rule, other specified classes of information.

#### HEARINGS

SEC. 7. In a hearing pursuant to sections 4 or 5—

(a) **PRESIDING OFFICERS.**—There shall preside at the taking of evidence (1) the agency or (2) one or more subordinate hearing officers designated from members of the body which comprises the agency, State representatives as authorized by statute, or examiners appointed as provided in this Act.

The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Except to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult or receive evidence or argument from or on behalf of any person or party except upon notice and opportunity for all parties to participate. Upon the filing in good faith of a timely and sufficient affidavit of personal bias, disqualification, or conduct contrary to law of any such officer, the agency or another such officer shall after hearing determine the matter as a part of the record and decision in the case.

Subject to the civil-service and other laws not inconsistent with this Act there shall be appointed for each agency as many qualified and competent examiners as may be necessary for the hearing or decision of cases, who shall perform no other duties, be removable only for good cause after hearing, and receive a fixed salary not subject to change except that the Civil Service Commission shall generally survey and adjust examiners' salaries in order to assure adequacy and uniformity in accordance with the nature and importance of the duties performed. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected from other agencies by the Civil Service Commission.

(b) **HEARING POWERS.**—Officers presiding at hearings shall have power, in accordance with the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, and (8) make decisions or recommended decisions in conformity with section 8.

(c) **EVIDENCE.**—The proponent of a rule or order shall have the burden of proceeding except as statutes otherwise provide. The conduct of every person



or status of any enterprise shall be presumed lawful until the contrary shall have been shown. Every party shall have the right of reasonable cross-examination and to submit rebuttal evidence except that in rule making or determining applications for licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of written evidence subject to opportunity for such cross-examination and rebuttal. Any evidence may be received, but no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence.

(d) **RECORD.**—The transcript of testimony and exhibits, together with all papers and requests relating to the hearing or issues, shall constitute the exclusive record for decision in accordance with section 8 and be made available to the parties. The taking of official notice as to facts beyond the record shall be unlawful unless the parties shall both be notified of the facts so noticed and accorded an opportunity to show the contrary.

#### DECISIONS

**SEC. 8.** In cases in which a hearing is required to be conducted in conformity with section 7—

(a) **ACTION BY SUBORDINATES.**—In cases in which the agency has not presided at the reception of the evidence, an officer or officers qualified to preside at hearings pursuant to section 7 shall either initially decide the case or the agency shall require the entire record certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision. Subordinate officers recommending decisions or making initial decisions shall first receive and consider written and oral arguments submitted by the parties.

(b) **SUBMITTALS AND DECISIONS.**—Prior to each recommended decision, initial decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded an opportunity for the submission of, and the officers participating in such decisions shall consider, (1) proposed findings and conclusions, (2) exceptions to decisions or recommended decisions of subordinate officers, and (3) supporting reasons for such exceptions or proposed findings or conclusions. All decisions and recommended decisions shall be a part of the record, stated in writing, served upon the parties, and include a statement of (1) findings of fact, conclusions of law, and reasons therefor upon all relevant issues of fact, law, or agency discretion presented, and (2) the appropriate rule, order, sanction, relief, or denial thereof supported by such findings, conclusions, and reasons.

#### SANCTIONS AND POWERS

**SEC. 9.** In the exercise of any power or authority—

(a) **IN GENERAL.**—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency by law and as specified and authorized by statute.

(b) **LICENSES.**—In any case, except financial reorganizations, in which a license is required by law and application is made therefor such license shall be deemed granted unless the agency shall within not more than sixty days of such application have made its decision or set the matter for proceedings required to be conducted pursuant to sections 7 and 8 of this Act or for other proceedings required by law. Except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety manifestly require otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and such person shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the holder thereof has made timely application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

(c) **PUBLICITY.**—Except as provided by law, no agency publicity reflecting adversely upon any person or enterprise shall be issued other than the public

release or availability of texts of authorized documents or statements of the positions of the parties to a controversy.

#### JUDICIAL REVIEW

SEC. 10. Except (1) so far as statutes expressly preclude judicial review, (2) in proceedings for judicial review in any legislative court, or (3) to the extent that agency action is by law committed to agency discretion—

(a) **RIGHT OF REVIEW.**—Any person adversely affected by any agency action shall be entitled to judicial review thereof in accordance with this section.

(b) **FORM AND VENUE OF ACTION.**—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of injunction or habeas corpus) in any court of competent jurisdiction. Any party adversely affected or threatened to be so affected may, through declaratory judgment procedure after resort to any adequate agency relief provided by rule or statute, secure a judicial declaration of rights respecting the validity or application of any agency action. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by statute.

(c) **REVIEWABLE ACTS.**—Every final agency action, or agency action for which there is no other adequate remedy in any court, shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Any agency action shall be final for the purposes of this section notwithstanding that no petition for review, rehearing, reconsideration, reopening, or declaratory order has been presented to or determined by the agency.

(d) **INTERIM RELIEF.**—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to preserve status or rights, afford an opportunity for judicial review of any question of law or prevent irreparable injury, every reviewing court and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or temporarily grant or extend relief denied or withheld.

(e) **SCOPE OF REVIEW.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without due observance of procedure required by law; (5) unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8; or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing.

#### CONSTRUCTION AND EFFECT

SEC. 11. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to any agency or person. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act. No subsequent legislation shall be held to supersede or modify the provisions of this Act unless such legislation shall do so expressly and by reference to the provisions of this Act so affected. This Act shall take effect three months after its approval except that sections 7 and 8 shall

take effect six months after such approval, the requirement of the selection of examiners through civil service shall not become effective until one year after the termination of present hostilities, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

[H. R. 1206, 79th Cong., 1st sess.]

A BILL To prescribe fair standards of administrative procedure, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act, divided into titles and sections according to the following table of contents, may be cited as the "Administrative Procedure Act".

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## TITLE I—GENERAL PROVISIONS

SEC. 101. DECLARATION OF GENERAL POLICY.—The exercise of all powers of government through administrative officers and agencies, so far as such exercise affects rights or withholds or confers benefits or privileges, shall be conducted according to established and published procedures and practices which shall assure the adequate protection of such rights, the impartial conferring of authorized benefits or privileges, and the effectuation of the declared policies of Congress, and shall be adapted to the reasonable necessities and differences of legislation and subject matter involved.

SEC. 102. DEFINITIONS.—Except as otherwise expressly stated or required by the context—

(a) "Agency" means each office, board, commission, independent establishment, authority, corporation, department, bureau, division, or other subdivision or unit of the executive branch of the Federal Government, and means the highest or ultimate authority therein.

(b) "Persons" means individuals or organized groups of any character, including partnerships, and other forms of agricultural, labor, business, commercial, or industrial organization or association, as well as Federal, State, or local agencies, subdivisions, municipal corporations, or officers.

(c) "Rules" means rules, regulations, standards, statements of policy, and all other types of statements issued by any agency, of general application and designed to implement, interpret, or make specific the legislation administered by, and the organization and procedure of, any agency; and includes rate making, price fixing, or the fixing of standards.

(d) "Adjudication" means the final disposition by any agency of particular cases (without distinction between licensing and other forms of proceeding).

(e) "Publication," whenever required by this Act and unless otherwise provided, means publication in the Federal Register, except that agencies may adopt such other and additional means of publication as they may deem appropriate and advisable.

SEC. 103. DELEGATION AND DECENTRALIZATION OF AUTHORITY WITHIN AGENCIES.—For the expedition and sound disposition of business, agencies may delegate authority in the following respects and subject to the following conditions, except that each agency shall in every case be responsible for all acts done pursuant to such delegated authority:

(a) CERTAIN TYPES OF DUTIES.—Subject to its own supervision, direction, review, reconsideration, or initial consideration in unusually important cases, every

agency is authorized to delegate to responsible members, officers, employees, committees, or administrative boards all matters of internal management and routine and the informal disposition or issuance of requests, complaints, applications, and other moving papers and matters of preliminary, initial, intermediate, or ancillary formal procedures in connection with the making of rules or adjudications.

(b) **BOARDS AND SINGLE ADMINISTRATORS.**—Every agency, the ultimate authority of which is vested in a board or commission, may delegate, subject to review or reconsideration by the full board or commission, any of its powers or functions to any one or more members of such board or commission, subject in each case to the further provisions of this Act; and where the ultimate authority in any agency is vested in a single individual such individual may (subject to such review or reconsideration as may be provided by rule or law) delegate any powers, duties, or functions to subordinate officers or employees.

(c) **FIELD OFFICES.**—Decentralization of authority and the establishment of field offices shall be encouraged and fostered where, in the judgment of any agency, there is need therefor or the business of the agency and convenience of parties will be facilitated thereby.

(d) **PUBLICATION OF ALL DELEGATIONS.**—Any such general delegation or decentralization, and attendant review procedures, shall, except as to matters of internal management and routine, be specifically provided and reflected in the published rules of the agency concerned.

**SEC. 104. APPEARANCE AND REPRESENTATION OF PARTIES.**—Any interested person may appear before any agency or the representatives thereof in person or by duly authorized representatives. When so appearing or represented, all reasonable facilities for negotiation, information, adjustment, or formal or informal determination of issues, questions, problems, or cases shall be afforded all such persons or their representatives. Every person appearing or summoned individually in any administrative proceeding shall be freely accorded the right to be accompanied and advised by counsel.

**SEC. 105. ATTORNEY AND AGENTS.**—In order to simplify the requirements for practice before agencies, the following and no other powers or requirements may be exercised or prescribed:

(a) **SUSPENSION OR DEBARMENT.**—Whether or not any agency maintains a roll of practitioners, it may, upon hearing and a finding of good cause therefor, preclude any person from practicing before it, subject to judicial review as to the reasonableness, in law or upon the facts, of such suspension or debarment upon any available statutory procedure or, in the absence thereof, upon application for an injunction.

(b) **ADMISSIONS TO PRACTICE.**—Requirements for the admission of attorneys or agents to practice, and the maintenance of formal registers of attorneys or agents, shall be omitted whenever practicable. The Office of Administrative Procedure may, subject to the conditions of this section, establish and maintain a central method for the registration or admission of attorneys and others to practice before several agencies.

(c) **ATTORNEYS.**—Where admissions to practice are deemed necessary by any agency, attorneys in good standing admitted to practice in the highest court of any State or Territory, or in any Federal court, shall, upon their written representation to that effect, be admitted to practice before such agency, except that the Patent Office may require of such attorneys such evidence of technical proficiency as may be reasonably necessary.

(d) **FORMER EMPLOYEES.**—Former employees of any agency may, subject to the conditions of this section, practice before such agency after the lapse of two years from the date of termination of their employment by such agency. Prior to the expiration of such period, such former employees, whether attorneys as defined in subsection (c) hereof or not, may be permitted to practice before the agency upon such additional restrictions or conditions as may be deemed necessary by the agency.

(e) **OTHER PERSONS.**—Other persons may be admitted to practice before any agency upon such reasonable regulations and requirements as such agency may find necessary.

**SEC. 106. INVESTIGATIONS.**—All investigations shall be conducted in such a manner as to disturb and disrupt personal privacy or private occupation or enterprise in the least degree compatible with adequate law enforcement. Required reports shall be simplified so far as possible. Compulsory process or inspections shall not be issued or demanded except when in the judgment of an agency there is need therefor, nor shall persons be requested to consent to such process or in-

spection in excess of statutory or constitutional limits. In order to avoid the necessity for formal process, where deemed practicable agencies may informally request and receive sworn statements on matters within their jurisdiction with the same authority and effect as though requested, submitted, or received at authorized formal hearings. The investigative powers or means of any agency shall be exercised only by the authorized representatives of such agency and for its authorized purposes, and shall not be exercised for the effectuation of purposes, powers, or policies of any other person or agency unless such exercise is expressly authorized by statute.

SEC. 107. SUBPENAS.—Administrative subpoenas authorized by statute shall be issued only upon request and a reasonable showing of the grounds, necessity, and reasonable scope thereof (but such showing of facts or evidence sought shall not be made available to agency prosecutors or investigators in the case), and shall be issued to private parties as freely as to representatives of the agency concerned.

SEC. 108. PUBLICITY.—Matters of record shall be made available to all interested persons, except personal data or material which the agency, for good cause and upon statutory authorization, find should be treated as confidential and except that any agency, for good cause found, may by published rule preserve as confidential specified classes of information. Agencies may make available special information upon request at cost or without charge. In all contested proceedings, agency publicity shall be withheld during preliminary or investigative phases of adjudication, except that any agency may publicize and give notice of general investigations or public inquiries. When formal proceedings are instituted, publicity and releases may be issued by an agency or its officers or employees only upon equality of treatment of representatives of the press and other interested parties and shall contain only the full text of impartial summaries of documents of public record; and such summaries shall, so far as deemed practicable, cover the public documents or positions of all parties to the proceeding or matter involved.

SEC. 109. PROVISION FOR THE CONTINUOUS IMPROVEMENT OF ADMINISTRATIVE PROCEDURE.—In order to assure the continuous and proper operation of the provisions of this Act, to make further studies and recommendations, and to perform the special functions hereinafter provided:

(a) OFFICE OF FEDERAL ADMINISTRATIVE PROCEDURE.—There shall be at the seat of government an independent establishment to be known as the Office of Federal Administrative Procedure (hereinafter referred to as the Office), with a Director learned in the law or qualified by experience, who shall be appointed by the President, by and with the advice and consent of the Senate, at a salary of \$10,000 per annum, and who shall, unless removed by the President for cause, hold office for the term of seven years or until a successor shall have been appointed. The Office shall be governed by a board composed of (1) the Director, (2) one of the associate justices of the United States Court of Appeals for the District of Columbia designated for that purpose by the chief justice of that court, and (3) the Director of the Administrative Office of the United States Courts. The latter two members shall serve ex officio and without further compensation.

(b) PERSONNEL FUNCTIONS AND STAFF.—The board (1) shall perform such functions respecting hearing commissioners as are provided in title III hereof; (2) may appoint, without regard for the provisions of the civil-service laws, and executive secretary and such attorneys, investigators, and experts as are deemed necessary to perform the functions and duties vested in the Office and fix their compensation according to the Classification Act of 1923, as amended; and (3) may appoint such other employees, with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary. During his term of office or employment, neither the Director nor any officer or employee of the Office shall engage directly or indirectly in practice before, or have private professional relationship with, any of the agencies or courts of the United States. The Office may, with the consent of any agency, utilize the personnel or facilities of the agency in the performance of its duties, and may utilize any other uncompensated services or facilities.

(c) OTHER DUTIES.—In order to carry out the policy of this Act, the Office shall (1) conduct inquiries into the practices and procedures of the several agencies to secure the just and efficient discharge of their public duties; (2) receive and respond promptly to all reasonable inquiries respecting administrative functions, procedures, or practices; (3) investigate complaints; (4) make recommenda-

tions to Congress and the agencies to secure the elimination of complaints and the adoption of just, efficient, and uniform methods of procedure; and (5) report annually on or before the 15th day of January to the President and Congress respecting the work of the Office during the year last past, the operation of this Act, and the legislative needs of the Federal administrative establishment in furtherance of the policies of this Act. The report shall also contain the names and qualifications of all hearing commissioners appointed since the last report, and the circumstances regarding any proceedings had for the removal of hearing commissioners.

(d) **SPECIAL INQUIRIES.**—The Office shall, from time to time, make studies and reports (1) to indicate in what respects the provisions of this Act may be amplified and extended; (2) to regularize the rules of pleading and evidence; and (3) to provide model or recommended procedures respecting investigations, licensing, tests and inspections, reparation cases, rate making and other special forms of rule making, claims against the United States, loans by public agencies, the distribution of benefits and gratuities, and other special types of administrative processes.

(e) **AGENCY LIAISON OFFICERS AND ADVISORY COMMITTEES.**—Upon the request of the Office, each agency shall name one of its members, officers, or employees to serve as liaison officer with the Office; and each agency shall promptly furnish the Office with all information and proper assistance requested. The Office shall organize and name advisory committees from the public service, the bar, and the public to aid it in the performance of any of its functions.

**SEC. 110. EFFECT AND ENFORCEMENT.**—The provisions of this Act shall serve as guides, limitations, or authority for the persons affected by administrative powers, for administrators in the exercise of those powers, and for the courts in reviewing the exercise of such powers. Any member, officer, or employee of an agency who violates the mandatory provisions of this Act shall, other laws to the contrary notwithstanding, be subject to disciplinary action, demotion, suspension, or discharge from the public service; and each agency head or member of the board or commission comprising the ultimate authority of any agency shall take such disciplinary measures as are appropriate to the case except that an honest mistake shall not be penalized.

**SEC. 111. SUSPENSION OF PARTICULAR APPLICATIONS OF CODE.**—Whenever the President finds, upon the application and reasoned recommendations of any agency and of the Office of Federal Administrative Procedure, that the application of any particular mandatory section, subsection, or provision of this Act to any particular part of any function or operation of such agency is unworkable or impracticable he may, upon such terms and conditions as he may provide to assure some other form of fair procedure as nearly as may be in accordance with the policies declared by this Act, suspend the operation of such application of any of the provisions of this Act by Executive order, which shall be published before the effective date of such suspension. Thereupon the operation of this Act as to such application shall be of no force or effect until thirty days subsequent to the termination of the next succeeding session of Congress, unless meanwhile (a) the President shall by published order have rescinded his order of suspension, or (b) Congress shall have amended this Act to permit such variation or to provide some substitute procedure (in which case such variation or substituted procedure shall prevail), or (c) Congress shall, by legislative act or concurrent resolution, have reaffirmed the application of this Act (in which case the suspension order of the President shall be of no further force or effect). If Congress shall take no action during such period, the suspension order of the President shall be of no further force or effect, except that further suspension orders may be issued upon like conditions. All such suspension orders, together with the supporting reasons and recommendations of the agency affected and of the Office of Federal Administrative Procedure (which shall have been also published and made available to the public at the time of the issuance of the Presidential order of suspension), shall be transmitted to Congress not more than ten days after the issuance of the order of suspension by the President or, if Congress is not then in session, not more than ten days after the commencement of the next session of Congress; and orders rescinding such suspension orders shall be similarly published and transmitted to Congress.

**SEC. 112. SEPARABILITY OF PROVISIONS.**—If any provision of this Act, or the application thereof, to any agency, person, public duty, procedure, or circumstances is held invalid, the remainder of the Act and the application of such provision to others shall not be affected thereby.

SEC. 13. EFFECTIVE DATE OF ACT.—This act shall take effect twenty days after its approval, except that subsections 308 (b), (c), (m) (1), (m) (2), (n), and (o) shall take effect six months thereafter unless prior thereto an agency shall complete its necessary adjustments and publish by rule its acceptance of the hearing commissioner system therein provided.

## TITLE II—ADMINISTRATIVE RULES AND REGULATIONS

SEC. 200. DECLARATION OF POLICY.—It is the declared policy of Congress that administrative agencies (a) shall issue rules, regulations, or statements of the types specified in this title in order that interested persons may have all possible information, both specific and general, as to administrative organization, policy, law, procedure, and practice; and (b) shall formulate such rules, regulations, or statements through the utilization of procedures authorized by this title and designed to extend the legislative process by securing the participation of interested parties, and shall make complete, adequate, and timely amendments, additions, and revisions through the same procedures. However, nothing in this title shall be deemed to require agencies to formulate in advance all rules necessary to cover all situations or every contingency which may arise under the statutes administered.

SEC. 201. EXCEPTIONS.—Whenever expressly found by an agency to be contrary to the public interest, the provisions of this title, in whole or part, shall not apply to (a) the conduct of military, naval, or national defense functions, or the selection or procurement of men or materials for the armed forces of the United States; or (b) the conduct of diplomatic functions, foreign affairs, or activities beyond the territorial limits of the United States affecting the relation of the United States to other nations. Such findings shall be published unless, in any given case, the President shall in writing direct the withholding of such publication.

SEC. 202. REQUIRED TYPES OF RULES.—Every agency is authorized and directed to formulate, issue, and publish from time to time, so far as applicable or appropriate in view of the legislation and subject matter with which the agency deals, rules in the following forms or containing (but not necessarily limited to) the following types of information:

(a) AGENCY ORGANIZATION.—Every agency shall promptly state in the form of rules, and keep current such statements of, its internal organization, specifying (1) its principal offices, officers, and types of personnel other than clerical or custodial, (2) its subdivisions, (3) the places of business or operation, duties, functions, and general authority or jurisdiction of each of the foregoing, and (4) the same information as to its field staff and organization.

(b) STATEMENTS OF POLICY.—Where an agency, acting under general or specific legislation, has formulated or acts upon general policies not clearly specified in legislation, so far as practicable such policies shall be formulated, stated, published, and revised in the same manner as other rules.

(c) RULES OF SUBSTANCE.—Each agency shall, as rapidly as deemed practicable, issue all rules specifically authorized or required by statute in order to implement, complete, or make operative particular legislative provisions, except that an agency may withhold such rule making by publishing an explanatory rule respecting each such situation.

(d) INTERPRETATIVE RULES.—Each agency shall issue, in the form of rules, all necessary or appropriate rules interpreting the statutory provisions under which it operates, and such rules shall reflect the interpretations currently relied upon by such agency and not otherwise published in the form of rules.

(e) RULES OF PRACTICE AND PROCEDURE.—All regularly available procedures, formal or informal, shall be formulated and promulgated as rules of practice and procedure. The description of such procedures shall be such as to disclose, so far as practicable, the general procedural stages, steps, and alternatives for all types of jurisdiction, functions, or cases of each agency.

(f) FORMS.—Each agency may prescribe the form and content of all papers, reports, applications, certificates, requests, complaints, responses, pleadings, briefs, or other documents.

(g) INSTRUCTIONS.—Every agency, the procedures of which in whole or part involve action upon extended or detailed statements, reports, or examinations, shall make and issue adequate instructions for such reports or examinations in order that persons affected may be clearly advised of the scope and requirements thereof.



**SEC. 203. FORM, CONTENT, AND PUBLICATION OF RULES.**—The following directions shall be observed in connection with all rules:

(a) **REPETITION OF LEGISLATION.**—Rules shall not merely repeat legislative provisions, except that, where restatement of the text of legislation is deemed advisable, legislative provisions shall be stated in italics or quotations marks and labeled to indicate their source.

(b) **TO BE COMPLETE AD CURRET.**—All rules shall be kept current at all times, and care shall be exercised to assure that rules shall be complete but not prolix or repetitions.

(c) **PUBLICATION OF RULES.**—No agency shall act upon unpublished rules, instructions, or statements of policy, except that staff instructions in special or individual cases or general instructions respecting matters of internal office management or routine need not be published and shall not be included in rules. All other rules shall be published in the Federal Register, and in addition agencies shall publish their rules (as reprints of the Federal Register or Code of Federal Regulations, or otherwise) from time to time (with or without the legislation under which they operate) in pamphlet form. Rules may be so published in the Federal Register as soon as practicable after their effective date where the agency concerned, for good cause, has found it necessary to make such rules effective before such publication and includes in its rules a statement regarding the publication of such special classes of rules.

(d) **ORGANIZATION, FORM, AND NUMBERING.**—All rules of an agency may be contained in a single set, but shall be separately stated as to (1) agency organization, (2) practice and procedure, and (3) substance. Rules may be otherwise organized as to form and numbering, provided that they are organized in such a manner as, in the judgment of the agency, will best reflect the particular subjects of administration and procedure.

**SEC. 204. RESCISSION OF RULES.**—After agency withdrawal or rescission, or judicial invalidation, of any rule, no person shall be held to incur any liability or penalty for conduct in accordance with such rule until after publication of its withdrawal for not less than thirty days, except that where the agency makes and publishes a finding of emergency such rescission may take effect upon publication or at any time thereafter specified by the agency. Rules may be modified in particular cases, either with the consent of persons affected or, where no rights are abridged or serious disadvantage imposed thereby, upon reasonable adequate notice to such persons.

**SEC. 205. FORMULATION OF RULES.**—Each agency shall both (1) formulate and publish a regularized procedure or procedures for the making of rules, subject to change for emergencies or special situations, and (2) designate, by rule, one or more of its existing or specially created units, committees, boards, officers, or employees, to receive suggestions and facilitate, correlate, revise, and expedite the making of rules, subject to the approval and supervision of the agency.

**SEC. 206. INVESTIGATIONS PRELIMINARY TO RULE-MAKING.**—Prior to the making of rules or the utilization of any of the procedures provided by this title, each agency shall conduct such preliminary nonpublic investigations as will enable it to formulate issues or proposed, tentative, or final rules.

**SEC. 207. DEFERRED EFFECTIVE DATE OF PROPOSED RULES.**—Wherever practicable and useful in the judgment of the agency, tentative rules or proposed amendments or rescissions shall be issued sufficiently in advance of their effective date to permit comment, the submission and consideration of oral or written criticism or argument, and revision or suspension prior to the designated effective date.

**SEC. 208. NOTICE OF RULE MAKING.**—General notice of proposed rule making shall be published wherever practicable, together with an invitation to interested parties to make written suggestions or to participate in rule-making procedures. Special notice to particular persons, representative persons, or groups or associations may be given. In either case, notice of the issues or scope of the proposed rules shall be given with as much particularity and definiteness as deemed practicable; and, where deemed practicable by the agency, the submission, or notice of availability upon request, of proposed or tentative rules shall be made as part of such notice. Where hearings or conferences are to be held, parties desiring to participate may be required to give notice to the agency of their desire to do so and of the materials they wish to present or issues they wish to discuss. The submission of reports or summaries of hearings, investigations, or conferences, or the publication of tentative drafts of rules, may be utilized as methods of notice of issues in rule making.

SEC. 209. PUBLIC RULE-MAKING PROCEDURES.—Without limiting the adoption of any other procedures, agencies are authorized to utilize in situations deemed appropriate by them any one or more of the following types of public rule-making procedures:

(a) SUBMISSION AND RECEPTION OF WRITTEN VIEWS.—Provision for the submission and consideration of written views shall be made in all cases of announced rule making, unless the agency concerned determines such a course to be impracticable.

(b) CONSULTATIONS AND CONFERENCES.—So far as practicable, preliminary to the promulgation of rules, agencies may provide for conferences and consultations with persons, or representative persons, likely to be affected by the proposed rules. In so doing, advisory committees or any other suitable means may be used. All interested parties, so far as deemed practicable, shall be invited to submit written suggestions or participate orally in such consultations or conferences.

(c) INFORMAL HEARINGS.—Where parties are numerous, or where the protection of the public interest requires, or where consultation and conference procedure is otherwise not adapted to the subject matter, public hearings may be held for the informal presentation of views or argument with reference to proposed rules. Parties unable to attend, because of time or expense or for other reasons, shall be permitted to submit written statements. Experts or employees of the agency may open such hearings with a presentation or summary of the results of preliminary investigation or consideration by the agency. The agency may designate any proper and responsible person as a presiding officer at such hearings, whose functions shall be the keeping of order, the elicitation of full data, and the restriction of oral statements, arguments, or testimony to reasonable limits. Agency counsel may be designated to aid in questioning where such procedure is deemed helpful to the agency. Records of such hearings may be kept, of which, where necessary or convenient, summaries may be made for the consideration of the agency or other persons to whom the agency desires to refer for further comment or consultation.

(d) FORMAL HEARING.—Where and to the extent that, in the judgment of the agency, issues involve sharply controversial matters best treated through formal procedures, or where legislation requires the holding of formal hearings prior to the making of rules, formal rule-making hearings shall be held. In such hearings, both oral testimony and sworn statements may be received, with adequate opportunity for cross-examination or rebuttal: *Provided, however*, That presiding officers, designated by the agency, shall limit statements and cross-examination to matters which will be helpful to the agency in reaching an informed judgment. The admission and exclusion of evidence shall be designed to secure for the agency all pertinent information, but repetition and the compilation of unduly lengthy records shall be avoided. Specific proposed findings, intermediate recommendations, or reports shall be made and issued upon which argument before the agency shall be held, but these may be eliminated where tentative or proposed rules are made available by published notice prior to argument. Agencies may adopt in such hearing procedure such of the provisions of title III hereof as they deem desirable.

(e) EMERGENCIES, CORRECTIONS, AND AMENDMENTS.—The foregoing procedural directions shall be dispensed with in emergencies, as well as in making minor and noncontroversial amendments.

(f) INITIAL PROMULGATION OF PRESENT UNPUBLISHED AGENCY ORGANIZATION AND PROCEDURES.—The promulgation of the organization and procedures of each agency or of a revision thereof, shall be done promptly upon the approval of this Act, and, except to the extent deemed necessary or advisable by the agencies, shall not be attended by any of the procedures specified by this section.

(g) EXISTING STATUTORY REQUIREMENTS.—The foregoing procedures shall not supersede or be held to repeal existing statutory requirements expressed specifically in legislation.

SEC. 210. RIGHT OF PETITION.—Any interested person shall have the right to request any agency to issue, amend, or rescind rules. Each agency shall provide, in accordance with the provisions of this title, the form, content, and procedure for the submission, reception, consideration, and disposition of such requests. Reports shall be made to Congress on the nature and disposition of such requests, as hereinafter provided in this title.

SEC. 211. JUDICIAL REVIEW.—Except as otherwise specifically required or precluded by law, any rule may be judicially reviewed upon contest of its application.

to particular persons or subjects, or upon proper application for declaratory judgment, as follows:

(a) **DECLARATORY JUDGMENTS.**—Declaratory judgments shall be rendered under this section only where the rule, or its threatened application, interferes with, or impairs, or threatens to interfere with or impair, the constitutional or statutory rights, privileges, immunities, or benefits of any person. Such judgments may be rendered without prior resort to the agency by the person seeking relief: *Provided, however,* That controversies as to the applicability of any rule to any person, property, or state of facts shall be determined by the declaratory ruling procedure provided in title III hereof.

(b) **SCOPE OF REVIEW.**—Upon such review, whether upon application for declaratory judgment or upon contest of the application of the rule to any person, property, or state of facts, the questions for determination by the court, so far as necessary to a decision, shall include (1) all matters of constitutional right, power, privilege, or immunity; (2) the statutory authority of discretion of the agency; and (3) the observance of all procedures required by law. Where, upon application for declaratory judgment, contest develops as to the facts or the applicability of the rule to any person, property, or state of facts, the court shall refer the case to the agency involved for a declaratory ruling as provided in title III hereof and shall terminate the proceeding for a declaratory judgment.

(c) **OTHER PROCEDURAL PROVISIONS.**—In all other respects, the provision of title III hereof regarding the judicial review of adjudications shall apply in any case.

**SEC. 212. RULINGS.**—Rulings in specific cases shall not, as a method or matter of general practice, be utilized to serve the functions of rules. Where rulings enunciate general rules or principles not otherwise published as rules or statutes, they shall be followed by the prompt formulation and promulgation of rules or statements of policy. Except those dealing with matters of management, budgets, or routine of no proper interest to persons having business before the agency, all rulings shall be made available to any person and specially published or reproduced in leaflet or bound form and, unless so published and made available, shall not be utilized, cited, or have any validity, force, or effect as to third parties.

**SEC. 213. ANNUAL REPORT TO CONGRESS ON RULES.**—Annually, in its report to Congress or otherwise, each agency shall transmit to Congress all rules promulgated during the preceding year, together with explanatory material relating to their substance and the procedure utilized in their formulation and promulgation. Such report shall also contain a statement concerning the nature and disposition of petitions received requesting the formulation, amendment, or repeal of rules as provided in this title.

### TITLE III—ADMINISTRATIVE ADJUDICATIONS

**SEC. 300. DECLARATION OF POLICY.**—It is the declared policy of Congress that administrative adjudications shall be attended by procedures which assure to every person affected: (a) Specific notice of issues and procedures at every stage of proceeding; (b) an adequate opportunity to present evidence and argument and to hear or see argument or evidence presented against him, including an opportunity to present such evidence and argument to any representative of any agency actually engaged in the formulation of decision; (c) prompt and speedy decision by impartial officers; (d) the full relief authorized by law where such relief is requested or, where sanctions are imposed, no greater or different penalties than those authorized by statute; and (e) an opportunity for judicial review as hereinafter provided.

**SEC. 301. EXCEPTION.**—Nothing contained in this title shall apply to or effect any matter concerning or relating to—

(a) administrative decisions, determinations, or orders subject to, or made and issued upon, trial de novo by a separate and independent administrative tribunal or in any court;

(b) diplomatic functions or foreign affairs, except in cases where particular citizens or residents of the United States are parties;

(c) the conduct of the military or naval establishments, the selection or procurement of men or materials for the armed forces of the United States, and national-defense functions declared and published by the President during any period of national emergency.

(d) the selection, appointment, promotion, transfer, dismissal, or discipline of an employee or officer of any agency;

(e) arbitration, mediation, or adjustment (as distinguished from adjudication) in the field of labor relations and other fields;

(f) fiscal and monetary operations of the Treasury, including foreign funds control;

(g) functions concerned with public works, relief, lending, or spending;

(r) the procurement or disposition of public (or publicly held) property;

or (i) the admission or control of aliens.

*Provided, however,* That, notwithstanding such exceptions other than those stated in (a) hereof, the provisions of this title shall apply to all proceedings in which the statutory rights, duties, or other legal relations of any person are required by law to be determined only after opportunity for hearing and, if a hearing be held, only upon the basis of a record made in the course of such hearing; and, as to all adjudicatory proceedings excepted from the operation of this title, its provisions, except those for judicial review and the appointment of hearing commissioners, shall be deemed advisory and may be adopted in whole or in part by rule of any such agency.

SEC. 302. EXPEDITION OF ADMINISTRATIVE ADJUDICATIONS.—Except upon the request or consent of the parties or where the public or private interests will not suffer unreasonably by delay, it is the declared policy of Congress that administrative adjudications shall be made speedily, and matters not susceptible of prompt informal disposition shall be set for formal hearing forthwith, and promptly heard, argued, and decided. In fixing the times and places for formal or informal proceedings, due regard shall always be had for the convenience and necessity of the parties involved or their representatives.

SEC. 303. DEFAULTS AND INFORMAL DISPOSITIONS.—Any agency is authorized to make informal disposition of adjudications or controversies within its jurisdiction, in whole or in part, and may make, issue, or enter (1) stipulations, agreed settlements, or consent orders; or (2) default judgments or orders where parties fail to file required answers or other required responsive pleadings or fail to appear or participate in scheduled formal proceedings or, upon request by the agency, fail to give notice of intention to do so. Whether or not facts are found, stipulated, or admitted, all such dispositions shall have the same force and effect as orders or determinations after formal proceedings. Formal procedures or hearings shall not be required or held in uncontested cases or where parties consent to proceed otherwise, unless in the judgment of the agency (1) the great number of parties or issues makes impossible or inadequate informal or default disposition or (2) the unusual nature and importance of the controversy require formal procedure in the protection of the public interest.

SEC. 304. DECLARATORY RULINGS.—Upon the petition of any interested person, every agency shall, in accordance with the provisions of this title, make and issue declaratory rulings when necessary to terminate a controversy or to remove a substantial uncertainty as to the application of administrative statutory authority or rules, with the same effect, and subject to the same administrative or judicial review or reconsideration as in the case of all other authorized adjudications of the agency. Such rulings shall not bind, or affect the rights of, persons or property not parties to, or named as the subject of, such proceedings to any greater extent than other types of authorized adjudications made pursuant to this title.

SEC. 305. NOTICE IN FORMAL AND INFORMAL PROCEEDINGS.—All notices, complaints, orders to show cause, moving papers, or amendments thereto issued by any agency shall specify with particularity the matters or things in issue, and shall not include charges or implied charges or requirements phrased generally or in the words of the statute under which the agency is proceeding: *Provided*, That an agency may identify, and quote or use the words of, any statute in the preliminary recitals to any notice and shall specify the statutory jurisdiction or other authority under which it is acting. Notices of the denial of applications, petitions, or other requests of persons shall be made and served upon the persons involved, shall specify with particularity the reasons and grounds for denial, and shall, so far as deemed practical, contain complete and specific suggestions or directions as to further administrative procedures or alternatives available to the persons involved.

SEC. 306. RESPONSIVE PLEADINGS OR NOTICES.—In lieu of or in addition to answers and other responsive pleadings, agencies are authorized to require notice by the parties of a desire to be heard and intention to appear.

SEC. 307. REQUIREMENT OF FORMAL PROCEDURES.—In all cases where informal procedures do not result in consent dispositions of matters initiated by an agency or pending upon applications for licenses, permits, claims, or permissions, formal adjudicatory procedure for the hearing and decision of cases shall be provided in accordance with section 308 hereof except that (a) where decisions rest upon

inspections or tests, upon demand reinspections or retests by superior officers shall be provided where other types of formal procedures are not provided; (b) where time or other factors indispensably require (and statutes authorize) summary preliminary, intermediate, or final action and disposition of matters, responsible officers or agents shall be made available for conferences and the prompt adjustment or other fair disposition of such matters, subject to prompt and fair informal review by the agency itself upon the request or protest of persons involved; (c) emergency action, where authorized and provided by law, shall be subject, so far as possible, to prompt reconsideration by the agency, with fair opportunity to present evidence and argument; and (d) by consent of the parties the application of any of the provisions of this title may be modified respecting any particular case.

**SEC. 308. FORMAL HEARINGS AND DECISIONS.**—In order to simplify, make uniform, and assure to every person a full and fair hearing and decision in every instance of administrative adjudication, the following formal procedures shall be observed:

(a) **SEGREGATION OF PROSECUTING FUNCTIONS IN FORMAL PROCEEDINGS.**—In all cases where agencies or their members or representatives make formal adjudications there shall be a complete segregation of prosecuting from hearing and deciding functions. Those heads, members, officers, employees, or representatives of any agency engaged in presiding at hearings or formulating findings and decisions in the course of formal proceedings shall not consult or advise with agency, counsel, investigators, representatives, or employees except upon notice to all affected parties and in open hearing or otherwise as provided herein: *Provided*, That the head, or members of a board which comprises the ultimate authority, of any agency may, so far as deemed desirable or necessary by the agency, in any case both hear or decide and (a) supervise or authorize the institution and general conduct of proceedings or the issuance of preliminary or intermediate orders or process, or (b) supervise the consideration, or reject offers, of settlement or consent disposition prior to or after the institution of formal proceedings; and any agency may, in its own name or by subordinate officers or employees, formally appear upon papers, pleadings, and decisions both as a moving party and as the deciding authority in any cause within its jurisdiction. Nothing herein shall be taken to preclude agency experts and other personnel from appearing at hearings and submitting opinions or evidence in the same manner as other witnesses.

(b) **HEARING AND DECIDING, OR PRESIDING, OFFICERS.**—Whenever the head of an agency or one or more members of the board or body which comprises the highest authority of the agency or a State representative authorized by statute to do so does not preside at the taking of evidence, all cases shall be heard and decided by a "hearing commissioner" as hereinafter provided. All other cases shall be heard and decided in accordance with this title by the head of an agency, or the board or body which constitutes the ultimate authority of the agency, or one or more members thereof; or an authorized representative of one of the States. All such hearing and deciding officers are hereinafter designated as "presiding officers", whose functions shall be judicial in nature and whose conduct shall be governed by the accepted canons of judicial ethics. As a matter of policy and general practice, presiding officers shall also render decisions in the cases they have heard. Where the head of an agency or the entire membership of the ultimate board or authority itself decides a case in the first instance as herein provided, the provisions hereinafter made for appeal to the agency shall not apply.

(c) **HEARING COMMISSIONERS.**—Subject to the provisions of this Act and other provisions of law not inconsistent herewith, there shall be appointed for each agency as many duly qualified hearing commissioners as may from time to time be deemed necessary for the hearing and decision of cases, and who shall have or perform no other duties or functions.

(1) Such appointments may be made upon nomination by the agency and without regard for the provisions of the civil-service laws or other existing laws applicable to the employment and compensation of officers and employees of the United States, by the Office of Federal Administrative Procedure (hereinafter referred to as the Office) after its consideration and approval of the training, experience, character, and temperament of such nominees to discharge the responsibilities of the office of hearing commissioner. The Office is authorized to make such investigations as may be necessary in order to pass upon the qualifications of nominees. Reappointments may be made by the Office, without the recommendation or intercession of the agency concerned, in all cases where

hearing commissioners have rendered creditable service. In the nomination, approval, disapproval, appointment, or reappointment of hearing commissioners no political test or qualification shall be permitted or given consideration, but all nominations and approvals shall be made solely upon the basis of merit and efficiency.

(2) Hearing commissioners shall receive an annual salary of not less than \$3,600 or more than \$9,000, to be paid from the available funds of the agency for which they are appointed or to which they are assigned. The Office shall fix, and may adjust from time to time, the appropriate salary scale for the hearing commissioners of each agency or type of functions or cases involved; and except as the salaries of hearing commissioners in office may be affected by such general adjustments in salary scales or appointment of such commissioners to different grades, the salary of any hearing commissioner shall not be increased or diminished during his term of office otherwise than by operation of an Act of Congress.

(3) Each hearing commissioner shall hold office for a period of twelve years and shall be removable only (a) upon certification by the agency executive that lack of official business or insufficiency of available appropriations renders necessary the termination of the hearing commissioner's appointment, and the approval of the Office; or (b) upon the statement of charges by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty; or (c) upon the statement of like charges by the Attorney General of the United States, which the Attorney General is authorized to make in his discretion after investigation of any complaint against a hearing commissioner made to the Attorney General by a person other than an agency. If the removal of a hearing commissioner is made after certification and approval as provided in (3) (a) hereof, the hearing commissioner so removed shall be placed upon an eligible list for reappointment in the event that circumstances warrant, and no new appointments of hearing commissioners shall be made in the agency of which he has been a part except by the Office from persons whose names appear on such list. A hearing commissioner upon whom charges under (3) (b) or (3) (c) hereof have been served may within five days thereafter demand a hearing upon the charges, to be held before the members of the Office or, if the Office so directs, before a trial board consisting of the Director and two other members designated by the Office. The manner by which requests for such hearings shall be made, the time and place at which such hearings shall be had, and the hearing procedure shall be prescribed by the Office. A hearing commissioner against whom such charges have been made shall stand suspended from office, but his salary shall continue for five days or until service of findings upon him after the hearing herein provided. The decision of the Office or the trial board, as the case may be, shall be accompanied by findings based upon the record of the hearing, and shall be final and unreviewable by any other officer or in any other forum. In the event the Office or the trial board, as the case may be, concludes that good cause for removal of a hearing commissioner has been shown, the hearing commissioner shall be deemed to have been removed from office as of the date on which findings so sustained are served upon him; but if it be concluded that such cause for removal of a hearing commissioner has not been established, the suspension of the hearing commissioner under charges shall terminate forthwith, and the hearing commissioner shall be at once restored to active status.

(4) In case of emergencies, the temporary incapacity of available hearing commissioners, temporary congestion of dockets, or where cases arise so infrequently that permanent hearing commissioners are unnecessary or where the Office for good cause authorizes the appointment of provisional hearing commissioners, hearing commissioners may be appointed as herein provided for a period not to exceed one year, which may be once renewed with the consent of the Office. At the conclusion of such provisional period, such hearing commissioners shall be regularly nominated, approved, and appointed, or in the alternative, shall be completely and permanently relieved of all assignments calling for the fulfillment of tasks appropriately performed by any hearing commissioner in the agency.

(5) Upon such terms and conditions as it may deem proper, the Office may authorize the temporary, intermittent, or occasional utilization of services of the hearing commissioners of one agency by another agency where the respective agencies request and consent to such service.

(6) The agency itself, or through a chief hearing commissioner whom it designates from among its duly appointed hearing commissioners, or any other designated officer or employee, shall assign cases to such commissioners, supervise the agency docket, and take all other similar appropriate and necessary steps to facilitate and expedite the hearing and decision of cases.

(7) Examiners presently in office with civil-service status, or hereafter appointed as presiding or hearing officers through civil service, may act and shall be designated as hearing commissioners under this section, but shall be subject to this section with respect to salaries and removals from office.

(d) **DISQUALIFICATION OF PRESIDING OFFICERS.**—Any party may file with the agency a timely affidavit of personal bias or disqualification of any presiding officer assigned to hear and determine any case, setting forth with particularity the grounds for such disqualification. After investigation or hearing by the agency or any other presiding officer to whom the matter may be referred, the agency or such presiding officer shall either find the affidavit without merit and direct the case to proceed as assigned or cause another presiding officer to be assigned to the case. Where such affidavit is found to be without merit the affidavit, any record made thereon, and a memorandum decision and the order of the agency shall be made a part of the record in the case and subject to available judicial review upon appeal from any order or decision ultimately entered. A presiding officer shall withdraw from any case wherein he deems himself disqualified for any reason.

(e) **POWERS AND DUTIES OF PRESIDING OFFICERS.**—In all cases presiding officers shall have power in any place (1) to administer oaths and affirmations, and take affidavits; (2) to issue subpoenas requiring the attendance and testimony of witnesses and the production of books, contracts, papers, documents, and other evidence; (3) to summon and examine witnesses and receive evidence; (4) to cause depositions to be taken in the manner prescribed by the rules of the agency; (5) to regulate all proceedings in every hearing before them and, subject to the rules and regulations of the agency, to perform all acts and take all measures necessary for the efficient conduct of the hearing; (6) to admit or exclude evidence; (7) to rule upon the form of any question asked or the scope and extent of testimony, statements, or cross-examination; and (8) subject to the rules of the agency, to dispose of motions, requests for adjournment continuances, and similar matters.

(f) **ENFORCEMENT OF ORDER AND PROCESS.**—If any person in connection with any administrative proceeding disobeys or resists any lawful order or process, or is guilty of misconduct during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpoenaed, or refuses to take the oath as a witness, or after taking the oath refuses to be examined according to law, the agency shall certify the facts to the district court having jurisdiction in the place at which the hearing is held, which court shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, compel compliance or punish such person in the same manner as for contempt.

(g) **PREHEARING CONFERENCES.**—Upon being so authorized and directed by the agency specially or by rules, every presiding officer shall have power, at any time subsequent to the formal initiation of the case and prior to his decision, to initiate, conduct, or participate in negotiations looking toward the informal settlement or other disposition in whole or in part of any case; and, in accordance with such rules and regulations as may be prescribed by the agency, each presiding officer shall have power in any case to direct the parties or their attorneys to appear before him at any such time for a conference to consider (1) the simplification of the issues; (2) the necessity or desirability of amendments to the pleadings; (3) the possibility of obtaining stipulations of fact and documents which will avoid unnecessary proof; (4) the limitation of the number of expert or other witnesses; and (5) such other matters as may expedite and aid in the disposition of the case.

(h) **RULES OF EVIDENCE.**—Immaterial, irrelevant, and unduly repetitious evidence shall be excluded from the record of any hearing and, as nearly as may be, the basic principles of relevancy, materiality, and probative force as recognized in Federal judicial proceedings of an equitable nature shall govern the proof of all questions of fact, except that such principles shall be (1) broadly interpreted in such manner as to make effective the adjudicative powers of administrative agencies, (2) shall be adapted to the legislative policy under

which adjudications are made, and (3) shall assure that as a practical matter testimony of reasonable probative value will not be excluded as to any pertinent fact.

(i) **CROSS-EXAMINATION, WRITTEN EVIDENCE, DEPOSITIONS, STIPULATIONS.**—Reasonable cross-examination in open hearing shall be permitted in the sound discretion of the presiding officer except that (1) ex parte statements may be admitted upon consent of the parties; (2) any agency may adopt procedures for the disposition of contested matters in whole or part upon the submission of written evidence, particularly with respect to technical matters and matters of conclusion or inference upon readily available and generally undisputed data, but subject always to rebuttal or cross-examination upon demand; (3) the taking of evidence upon deposition may be utilized by any agency to simplify and expedite the hearing or determination of cases, under such rules as the agency may provide; and (4) any agency may simplify hearings by providing for agreed stipulations of fact as to the whole or any part of the issues in any case.

(j) **OFFICIAL NOTICE.**—Agencies may take official notice of any matter of generally recognized fact or any technical or scientific fact of established character, but parties shall be notified either during hearings or by full reference in decisions or reports or otherwise, of the matters so noticed, with an adequate opportunity to show that such facts are erroneously noticed.

(k) **SUBMISSION OF PROPOSED REPORTS, FINDINGS, ARGUMENTS, AND BRIEFS.**—At the conclusions of hearings, the presiding officer shall afford the parties due notice and opportunity for the submission of proposed findings and briefs or memoranda, and for oral argument. Where the agency itself decides a case or responds to certified questions of law or policy in which it has not heard the evidence and in which no decision of a presiding officer has been rendered, as authorized by subsection (m) (2) hereof, an intermediate report of specific, recommended, and reasoned findings of fact and conclusions of law shall be made and issued by the officer or officers who presided at the taking of evidence; and the agency, before decision, shall afford all parties reasonable opportunity for briefs and argument before it upon the basis of such report or upon such other and further specification of issues as it may indicate to the parties.

(l) **RECORDS.**—In all formal proceedings only one official record (of which there may be any number of copies) shall be kept, upon which decision shall be made and which shall be available to all parties. As to matters of fact, officers hearing or deciding cases, and their assistants or clerks, shall, except as to briefs filed in the case and appropriate matters of official notice, consult no other files, records, data, or materials.

(m) **DECISIONS.**—In the consideration and decision of all administrative cases submitted for adjudication—

(1) presiding officers who heard the case (unless unavailable because of death, illness, suspension, or otherwise, in which case another presiding officer shall complete the disposition of the case) shall find all the relevant facts, including conclusions and inferences of fact, make conclusions of law, and enter an appropriate order, award, judgment, or other form of decision, which shall become a part of the record;

(2) in unusual cases the presiding officer may, upon the conclusion of the hearing in any case, certify to the agency any questions or propositions of law or policy for instructions, and thereupon the agency shall give binding instructions on the questions or propositions so certified; or, upon the conclusion of the hearing in any case, the agency, on petition of all the private parties therein and for good cause shown, may direct that the entire record be forthwith transmitted to it for decision;

(3) all decisions, whether of the presiding officer or of the agency itself, shall be in writing and accompanied both (1) by a statement of the reasons therefor (which may be simple or elaborate as the case may be deemed to require) and (2) by separately stated findings of fact (except to the extent that the facts are stipulated) and conclusions of law upon all points upon which the decision is rested, except that separate statements of reasons may be omitted where such findings or conclusions adequately set forth the reasons for the decision, and except that on review by it any agency may adopt in whole or part the findings, conclusions, and decisions of presiding officers;

(4) in the consideration and decision of any case, hearing, or deciding officers shall personally master such portions of the record as are cited by the parties. They may utilize the aid of law clerks or assistants (who



shall perform no other duties or functions) but such officers and such clerks or assistants shall not discuss particular cases or receive advice, data, or recommendations thereon with or from other officers or employees of the agency or third parties, except upon written notice and with the consent of all parties to the case or upon open rehearing;

(5) all such findings, conclusions, decisions, opinions, and orders shall be promptly served upon the interested parties or their representatives, together with, so far as practicable, a statement of any further procedures or alternatives available to such parties;

(6) in every case, the findings and conclusions shall encompass all relevant facts of record and shall themselves be relevant to, and shall adequately support, the decision, order, or award entered;

(7) each agency shall specially publish in leaflet or bound form such of its decisions as are deemed valuable to the public or are to be relied upon as precedents;

(8) nothing in this section shall be taken to preclude any officer or employee of an agency, or group of officers or employees, from presenting for the consideration of deciding officers proposed findings, reports, or decisions (in addition to those presented by the presiding officer) provided the parties are afforded adequate notice and opportunity to meet such proposals by briefs and oral argument.

(n) **EFFECT OF DECISIONS OF PRESIDING OFFICERS.**—In the absence of an appeal to, or review by, the agency within such reasonable period of time as may be prescribed by rule by the agency for that purpose, a decision of a presiding officer shall without further proceedings become the final decision of the agency and, as such, enforceable (or subject to subsequent reopening or reconsideration) to the same extent and in the same manner as though it had been duly entered by the agency as its decision, judgment, order, award, or other ultimate determination in the case. Decisions subject to the approval of the President, however, shall not become effective until such approval has been duly given.

(o) **AGENCY REVIEW OF DECISIONS OF PRESIDING OFFICERS.**—Upon appeal to the agency from a decision of a presiding officer, the appellant shall set forth separately each error asserted, in detail and with particularity; and only such questions as are specified by the appellant's petition for review and such portions of the record as are specified in the supporting brief need be considered by the agency. Where the appellant asserts that the findings of fact made by the presiding officer are unsupported by evidence, the agency may limit its review of such ground to the inquiry whether, upon the portions of the record cited by the parties, the findings made by the presiding officer are clearly contrary to the manifest weight of the evidence. Where an agency on petition or on its own motion reviews the decision of a presiding officer, it shall with particularity specify the points, issues, or grounds of such review. Upon the taking of an appeal to it or upon review by it on petition or its own motion, the agency shall have authority to affirm, reverse, modify, or set aside in whole or in part the decision of the presiding officer, or to remand the case to the presiding officer for the purpose of receiving further evidence and making further findings and conclusions or for further proceedings.

(p) **REHEARING, REOPENING, AND RECONSIDERATION OF DECISIONS.**—All decisions which have become final may be subject to rehearing, reopening, or reconsideration by a presiding officer of the agency in the manner and to the extent authorized by the legislation under which the agency originally exercised adjudicatory powers, under such rules as the agency may provide.

**SEC. 309. SANCTIONS AND BENEFITS.**—Only upon final adjudication shall action be taken or powers exercised except in connection with necessary preliminary, intermediate, or emergency powers expressly authorized by statute. Penalties, recoveries, denials, conditions, and prohibitions shall not be imposed, exercised, or demanded beyond those authorized by statute, and no sanctions not authorized by statute shall be imposed by any agency or combination of agencies. Rights, privileges, benefits, or licenses authorized by law shall not be denied or withheld in whole or in part where adequate right or entitlement thereto is shown. The effective date of the imposition of sanctions or withdrawal of benefits or licenses shall, so far as deemed practicable, be deferred for such reasonable time as will permit the persons affected to adjust their affairs to accord with such action or to seek administrative reconsideration or judicial review.

**SEC. 310. JUDICIAL REVIEW.**—In order to facilitate and simplify review by the Federal courts of all administrative adjudications and to eliminate technical

impediments thereto, judicial review of administrative action shall be had in accordance with the following principles:

(a) **SPECIAL PROVISIONS.**—All provisions of law for judicial review applicable to particular agencies or subject matter, except as the same may be inconsistent with the provisions of this title, shall remain valid and binding, as shall all provisions specifically precluding judicial review or prescribing a broader scope of review than provided in subsection (c) hereof.

(b) **RIGHT AND PARTIES.**—Except as otherwise specifically provided by law or excepted from the operation of this title, and regardless of whether the subject is one of constitutional or statutory right, power, privilege, immunity, or benefit, any party adversely affected by any final decision of any agency rendered pursuant to the formal procedures provided herein shall be entitled to judicial review in accordance with applicable statutory provisions or, in the absence thereof, by application in equity or for writ of mandamus. All decisions upon such review shall be subject to appeal, or review upon writ of certiorari by the Supreme Court of the United States, as provided by law.

(c) **COURTS AND VENUE.**—Whenever a court shall hold that it is without jurisdiction to hear and determine a timely application or petition for such review on the ground that the same should have been filed before some other court, it shall transmit such pleadings and other papers, together with a statement of its reasons for doing, to such court of competent jurisdiction as may be designated by the applicant or petitioner, which court shall, after permitting any necessary amendments, thereupon proceed as in other cases. Where such applications or petitions are filed in the proper court but are deficient in form or type of remedy, timely amendment shall be permitted.

(d) **REVIEWABLE ORDERS.**—Administrative orders, declaratory or otherwise, directing action, assessing penalties, prohibiting conduct, or denying claimed rights, privileges, or benefits under the Constitution or statutes shall be subject to such review: *Provided, however,* That only final orders or orders for which there is no other adequate judicial remedy shall be subject to such review. Preliminary or intermediate orders, so far as the same are by law reviewable, shall be subject to review upon the review of final orders. An order shall be final for purposes of such review notwithstanding that no petition for rehearing or reconsideration has been presented to the administrative authority involved.

(e) **SCOPE OF REVIEW.**—Regardless of the form of the review proceeding, the reviewing court shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions arising upon the whole record or such parts thereof as may be cited by any of the parties; and shall set aside administrative findings, inferences, conclusions, or orders whenever it finds them: (1) contrary to constitutional right, power, privilege, or immunity; (2) in excess of the statutory authority or jurisdiction of the agency; (3) made or promulgated upon unlawful procedure; (4) unsupported by substantial evidence; or (5) arbitrary or capricious: *Provided, however,* That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it.

(f) **RECORD.**—Upon petition or application for judicial review, enforcement, of restraint of an administrative order or action, it shall not be necessary to print the complete administrative record and exhibits in the case unless the reviewing court for good cause so orders. The moving party shall print as a supplement or appendix to his brief, which may be separately bound, the pertinent pleadings, orders, decisions, opinions, findings, and conclusions of both the agency and any presiding officer, together with relevant docket entries arranged chronologically and such further parts of the record as it is desired the court shall read. Omissions shall be indicated, reference to the pages of the typewritten transcript of the record as filed shall be made, and the names of witnesses shall be indexed. The responding party shall similarly print such portions of the record as it is desired the court shall read. Reviewing courts may by rule amplify or modify the provisions of this section to further its purpose.

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[H. R. 2602, 79th Cong., 1st sess.]

A BILL To facilitate the administration of government and improve the quality of justice

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Fair Government Practices Act." Its objects shall be to improve the relations between

private citizens and governmental authority, to facilitate the administration of justice, to protect civil rights, and to preserve the form of government guaranteed by the Constitution of the United States of America.

#### PUBLIC INFORMATION

SEC. 2. To the end that every person, entity, or organization shall be fully informed of the law, regulations, and procedure of every office, board, commission, independent establishment, authority, corporation, department, bureau, division, institution, service, administration, or other unit of the executive branch of the Federal Government, hereinafter called "agency," except to the extent that there is directly involved any military, naval, or diplomatic function requiring secrecy in the public interest—

#### RULES

(a) Every agency shall separately state and currently publish in the Federal Register—

(1) descriptions of its internal and field organization, together with the general course and method by which each type of matter directly affecting private parties is channeled and determined;

(2) substantive regulations authorized by law and required to effectuate authority or apprise parties of rights or liabilities, as well as all statements of general policy or interpretation of general public application and utilized by the agency; and

(3) rules specifying the nature and requirements of all formal or informal procedures available to private parties, including simplified forms and adequate instructions as to all papers, reports, or examinations.

#### ORDERS

(b) Every agency shall preserve and publish or make available to public inspection all—

(1) rulings on questions of law, other than those relating to the internal management of the agency and not directly affecting the public or the rights of any person as defined by this Act; and

(2) orders, including findings or opinions with reference thereto, issued in the adjudication of any case.

#### RELEASES

(c) All releases intended for general public information or of general application or effect not otherwise published or made available pursuant to this section shall be—

(1) filed promptly with the Division of the Federal Register, and

(2) there preserved and made available to public inspection:

*Provided, however,* That no agency shall, directly or indirectly, issue publicity reflecting adversely upon any person, product, commodity, security, private activity, or enterprise otherwise than by issuance of the full texts of authorized public documents, impartial summaries of the positions of all parties to any controversy, or the issuance of legal notice of public proceedings within its jurisdiction.

#### LIMITATION OF PENALTIES, INVESTIGATIONS, AND REPORTS

SEC. 3. To the end that administrative penalties, investigations, and reports shall be limited to the requirements of good government, and parties be assured rights of appearance and prompt relief—

#### PENALTIES AND BENEFITS

(a) No agency shall impose penalties or forbid or require action not both specified by statute and expressly delegated to such agency by lawful authority; and any sanction, seizure, process, penalty, prohibition, requirement, remedy, relief, assistance, license, permit, or other grant, or permission imposed or dispensed by any agency through any rule, order, license (including any term or condition thereof) or otherwise shall be unlawful to the extent that it is in excess of administrative authority or withholds privileges or benefits in derogation of private right: *Provided, however,* That no person shall be subject to any rule or order prior to its publication or service, respectively, for a reasonable time unless

both expressly authorized by law and required in any case for good cause: *And provided further*, That no person shall be subjected to any penalty or deprived of any right or privilege for action taken in accordance with the rule, order, permission, or interpretation of any agency.

#### LICENSES AND PERMITS

(b) No license (including permit, certificate, approval, registration, charter, membership, or other form of permission) shall—

- (1) be required by any agency unless expressly authorized by statute;
- (2) be denied or withdrawn, revoked, annulled, or suspended in whole or in part except in accordance with this Act;
- (3) be withdrawn unless first any facts which may warrant such withdrawal shall have been officially brought to the attention of the licensee in writing followed by reasonable opportunity to demonstrate or achieve compliance with all lawful requirements except in cases of clearly demonstrated willfulness or those in which public health, morals, or safety require otherwise; or
- (4) expire, with reference to any business, occupation, or activity of a continuing nature in any case in which due and timely application for a renewal or a new license has been made, until such application shall have been finally determined:

*Provided, moreover*, That in any case subject to section 6 (except financial reorganizations) in which an administrative license or permission is required by law and due request is made therefor but no final administrative action is taken, such license or permission shall be deemed granted in full to the extent of the authority of the agency unless the agency shall within sixty days of such application have set the matter for formal proceedings required by this Act.

#### INVESTIGATIONS

(c) No agency shall exercise investigative powers or require reports unless—

- (1) expressly authorized by statute and within its lawful jurisdiction;
- (2) through regularly authorized representatives for authorized purposes;
- (3) without infringing rights of personal privacy;
- (4) without disturbing private occupation or enterprise beyond the reasonable requirements of law enforcement; and
- (5) substantially necessary to the operation of the agency.

#### SUBPENAS

(d) Every agency shall issue subpoenas authorized by law to private parties upon request and, as may be required by its general rules of procedure, upon a simple statement of the general purpose or reasonable scope of the testimony or other evidence so sought; and the names of witnesses and the purpose and nature of the evidence so sought shall not be made available to agency prosecutors or investigators. Upon contest of the validity of any administrative subpoena or upon the attempted enforcement thereof, the court shall determine all questions of law raised by the parties, including the authority or jurisdiction of the agency in law or fact, and shall enforce (by the issuance of a judicial order requiring the future production of evidence under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

#### APPEARANCE

(e) Every agency shall accord every person subject to administrative authority and every party or intervenor (including individuals, partnerships, corporations, associations, or public or private agencies or organizations of any character) in any administrative proceeding or in connection with any administrative authority—

- (1) the right at all reasonable times to appear in person or by counsel;
- (2) every reasonable opportunity and facility for negotiation, information, adjustment, or formal or informal determination of any issue, request, or controversy;
- (3) the right to be accompanied and advised by counsel; and
- (4) a prompt determination of any matter within the jurisdiction or competence of the agency:

*Provided, however*, That no such person or party shall in any manner be made to suffer, through the subsequent exercise of administrative powers or otherwise,

the consequences of any unwarranted or avoidable administrative delay in determining any such matter. In all cases in which an administrative hearing is required by law and the parties are not in default, matters not susceptible of informal disposition in whole or in part shall be promptly heard and decided, except that in fixing the times and places for formal or informal proceedings due regard shall be had for the convenience and necessity of the parties or their representatives.

#### JUDICIAL REVIEW

SEC. 4. In order that every reviewing court shall have plenary authority to render such decision and grant such relief as right and justice may demand in full conformity with this Act and all other applicable law—

#### RIGHT OF REVIEW

(a) Notwithstanding any contract, agreement, or undertaking to the contrary, any party subject to, or adversely affected by, any administrative action, rule, or order within the purview of this Act or otherwise presenting any issue of law shall be entitled to judicial review thereof—

(1) as an incident to proceedings for any form of criminal or civil enforcement;

(2) through any special statutory review proceeding relevant to the subject matter; or

(3) in the absence or inadequacy of any relevant statutory review procedure, through any applicable form of legal action, including actions for declaratory judgment or for writs of injunction, mandamus, or habeas corpus:

*Provided, however,* That any final administrative order (including those upon applications for declaratory rulings or the neglect, failure, or refusal of any agency to act upon any application for a rule, order, permission, or the amendment or modification thereof within the time prescribed by law or within a reasonable time) directing action, assessing penalties, prohibiting conduct, affecting rights or property, or denying in whole or in part claimed rights, remedies, privileges, licenses, permissions, moneys, or benefits under the Constitution, statutes, or other law of the land shall be subject to review pursuant to this section. Any preliminary or intermediate order shall be directly reviewable in any case in which no other judicial remedy is fully adequate. All orders not directly reviewable shall be subject to review upon the review of final acts, rules, or orders. Any action, rule, or order shall be final for purposes of the review guaranteed by this section notwithstanding that no petition for rehearing, reconsideration, reopening, or declaratory ruling has been presented to or ruled upon by the agency involved.

#### INTERIM RELIEF

(c) Unless the agency of its own motion or on request shall postpone the effective date of any action, rule, or order pending judicial review, every reviewing court, and every court to which a case may be taken on appeal from or upon application for certiorari or other writ to, a reviewing court, shall—

(1) have full authority to issue all necessary and appropriate writs, restraining or stay orders, or preliminary or temporary injunctions, mandatory or otherwise, required in the judgment of such court to preserve the status or rights of the parties pending full review and determination as provided in this section;

(2) postpone the effective date of any administrative action, rule, or order to the extent necessary to accord the parties a fair opportunity for judicial review of any substantial question of law; and

(3) grant such affirmative relief, notwithstanding statutory or other administrative authority in the premises, in any case in which any legal right, privilege, immunity, permission, relief, or benefit expires or is denied, withdrawn, or withheld, in whole or in part, to the extent necessary to preserve the status of the parties pending the review guaranteed by this section.

#### SCOPE OF REVIEW

(d) The reviewing court shall consider and decide all relevant questions of law arising upon the whole record; and the court shall hold unlawful any act or set aside any application, rule, order, or administrative finding or conclu-

sion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them—

- (1) inconsistent with any requirement of this Act;
- (2) contrary to constitutional right, power, privilege or immunity;
- (3) in excess of statutory authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit;
- (4) made or issued without full observance of all procedures required by law;
- (5) unsupported by substantial, credible, and material evidence upon the whole administrative record in any case in which the action, rule, or order is required by statute to be taken, made, or issued after administrative hearing;
- (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court; or
- (7) arbitrary or capricious.

#### APPEALS

(e) The judgments of original courts of review shall be appealable in accordance with existing provisions of law and, in cases in which there is no appeal thereto as of right and probable ground appears that any person has been denied the full benefit of this Act, reviewable by the Supreme Court upon writs of certiorari.

#### OTHER PROVISIONS OF LAW

(f) All provisions or additional requirements of law applicable to the judicial review of acts, rules, or orders generally or of particular agencies or subject matter, except as the same may be inconsistent with the provisions of this Act, shall remain valid and binding as shall all statutory provisions expressly precluding judicial review or prescribing broader scope or availability of review than that provided in this section.

#### SEPARATION OF PROSECUTING FUNCTIONS

SEC. 5. In order that no head, member, officer, employee, or agent of any agency shall serve both as prosecutor and deciding authority—

(a) No proceeding, rule, or order subject to the requirements of section 6 shall be lawful unless with reference to that type of proceeding the agency involved shall have previously and completely delegated either to one or more of its responsible officers or to one or more of its members all investigative and prosecuting functions (over which no hearing or deciding officer shall thereafter have exercised any control or supervision) and the officers or members so designated shall have had no part in the decision or review of such cases; and, in any agency in which the ultimate authority is vested in one person, such individual shall also delegate the hearing and initial decision of such cases to examiners or boards of examiners.

(b) In the making of rules or consideration of petitions subject to the requirements of section 5, no subordinate officer or employee exercising or supervising investigative or prosecuting functions shall take any part in the decision as to the form or contents of any rule or the acceptance or rejection of such petitions.

(c) Every general delegation and separation of functions required of any agency by this section shall be specifically provided in its rules published pursuant to section 1: *Provided, however,* That in any complaint or other paper the agency may appear in name as the moving party; and nothing in this section shall be taken to prevent the supervision, consideration, or acceptance of settlements or adjustments by hearing or deciding officers.

#### RULE MAKING

SEC. 6. Except to the extent that there is directly involved any military, naval, or diplomatic function of the United States—

##### NOTICE

(a) Every agency shall publish general notice of proposed rule making including—

- (1) a statement of the time, place, and nature of any available public rule making procedures;

(2) full and specific reference to the authority under which the rule is proposed; and

(3) a description of the subjects and issues involved:

*Provided, however,* That this subsection shall not be mandatory as to interpretative rules, general statements of policy, or rules of agency organization or procedure and shall not apply in cases in which notice is impracticable because of unavoidable lack of time or other emergency affecting public safety or health.

#### PROCEDURES

(b) In all cases in which notice of rule making is required pursuant to subsection (a) of this section or otherwise, the agency shall afford interested parties an adequate opportunity, reflected in its published rules of procedure, to participate in the formulation of the proposed rule or rules through—

(1) submission of written data or views;

(2) attendance of conferences or consultations; or

(3) presentation of facts or argument at informal hearings:

*Provided, however,* That, in place of the foregoing provisions of this subsection, in all cases in which rules are required by statute to be issued only after a hearing, the hearing and decision requirements of sections 7 and 8 shall apply. In all other rule-making procedures parties unable to be present shall be entitled as of right to submit written data or arguments, all submissions shall be given full consideration by the agency, and the reasons as well as findings and conclusions of the agency as to all relevant issues shall be published upon the issuance or rejection of the rules or proposals involved. Nothing in this section shall be held to limit or repeal additional requirements imposed by law.

#### PETITIONS

(c) Every agency authorized to issue rules shall accord any interested person the right to petition for the issuance, amendment, or rescission of any rule in conformity with adequate published procedures for the submission and prompt consideration and disposition of such requests.

#### ADJUDICATION

SEC. 7. In every case of administrative adjudication in which the rights, duties, obligations, privileges, benefits, or other legal relations of any person are required by statute to be determined only after opportunity for an administrative hearing, except to the extent that there is directly involved any matter subject to a subsequent trial of the law and the facts de novo in any court—

#### NOTICE

(a) Every agency undertaking the adjudication of any case shall serve notice in writing upon all parties directly affected, specifying—

(1) the time, place, and nature of available administrative proceedings;

(2) the particular legal authority and jurisdiction under which the proposed proceeding is to be had; and

(3) the matters of fact and law in issue:

*Provided, however,* That the statement of issues of fact in the words of the authority under which the agency is proceeding shall not be compliance with this requirement.

#### PROCEDURE

(b) In every case in which notice is required the agency shall afford all interested parties the right and benefit of fair procedure for the settlement or adjudication of all relevant issues through (1) an adequate opportunity for the informal submission and full consideration of facts, claims, argument, offers of settlement, or proposals, of adjustment and (2) thereafter, to the extent that the parties are unable to so determine any controversy by consent, formal hearing, and decision in conformity with sections 7 and 8.

#### DECLARATORY RULINGS

(c) Upon the petition of any proper party and in conformity with this section, every agency shall, except in tax and patent matters, make and issue declaratory rulings to terminate a controversy or to remove uncertainty as to the validity

or application of any administrative authority, rule, or order with the same effect and subject to the same judicial review as in the case of other rules or orders of the agency.

#### HEARINGS

Sec. 8. No administrative procedure shall satisfy the requirement of a hearing pursuant to sections 5 or 6 unless—

##### PRESIDING OFFICERS

- (a) To insure the impartiality of hearing or deciding officers—
- (1) the case shall be heard—
    - (A) by the ultimate authority of the agency or by
    - (B) one or more subordinate hearing officers designated by the agency from members of the board or body which comprises the highest authority therein,
    - (C) State representatives authorized by statute to preside at the taking of evidence, or
    - (D) examiners who shall perform no other duties, shall be removable only after hearing for good cause shown, and shall receive a fixed salary not subject to change: *Provided, however,* That in the event hearing or deciding officers are no longer in office or are unavailable because of death, illness, or suspension, other such officers may be substituted in the sound discretion of the agency at any stage of proceedings required by this section and section 8;
  - (2) the functions of all hearing officers, as well as of those participating in decisions in conformity with section 8, shall be conducted in an impartial and considerate manner, in accord with the requirements of this Act, with due regard for the rights of all parties as well as the facts and the law, and consistent with the orderly and prompt dispatch of proceedings;
  - (3) such officers, except to the extent required for the disposition of ex parte matters authorized by law, shall not engage in interviews with, or receive evidence or argument from, any party directly or indirectly except upon opportunity for all other parties to be present and in accord with the public procedures authorized by this section and section 8. Copies of all communications with such officers by, respecting, or on behalf of any party or case shall be served upon all the parties;
  - (4) upon the filing of a timely affidavit of personal bias, disqualification, or conduct contrary to law of any such officer at any stage of proceedings, the agency or another such officer, after hearing the facts, shall make findings, conclusions, and a decision as to such disqualification which shall become a part of the record in the case and be reviewable in conformity with section 3.

##### EVIDENCE

- (b) To assure that administrative decision shall be made upon a basis of fact—
- (1) the principles of relevancy, materiality, probative force, and substantiality as recognized in Federal judicial proceedings of an equitable nature shall govern the proof, decision, and judicial review of all questions of fact;
  - (2) the character and conduct of every person or enterprise shall be presumed lawful until the contrary shall have been shown by competent evidence;
  - (3) In every case in which the burden of proof is upon private parties to show right or entitlement to exceptions, privileges, permits, or benefits their competent evidence to that effect shall be presumed true unless affirmatively disproved by other evidence;
  - (4) every party shall have the right of cross examination and the submission of rebuttal evidence;
  - (5) the taking of official notice shall be unlawful unless of a matter of generally recognized or scientific fact of established character and unless the parties, before the decision becomes effective, are accorded an adequate opportunity to show the contrary by evidence;
  - (6) no sanction, prohibition, or requirement shall be imposed or grant, license, permission, or benefit withheld in whole or in part except upon evidence which on the whole record is competent, credible, substantial and material.



## RECORD

(d) The transcript of testimony adduced and exhibits admitted, together with all pleadings, exceptions, motions, requests, and papers filed by the parties, other than separately presented briefs or arguments of law, shall constitute the complete and exclusive record and be made available to all the parties.

## DECISIONS

SEC. 9. In all cases in which an administrative hearing is required to be conducted in conformity with section 7—

## INTERMEDIATE REPORTS

(a) Unless the officer or officers who presided at the hearing also decide the case, they shall prepare and serve upon all parties and deciding officers an intermediate report of specific recommended findings of fact and conclusions of fact and law upon all relevant issues presented by the whole record.

## SUBMISSIONS

(b) Officers who prepare intermediate reports or decide cases shall, prior to the preparation of such reports or decision of cases, afford all parties full opportunity for the submission of briefs, exceptions to any intermediate report, proposed findings or conclusions, and oral argument.

## CONSIDERATION OF CASES

(c) All issues of fact shall be considered and determined exclusively upon the record made in conformity with section 7. In the formulation and submission of intermediate reports or in the decision of any case, all hearing or deciding officers shall personally consider the whole or such parts of the record as are cited by the parties, with no other aid than that of clerks or assistants who perform no other duties; and no such officer, clerk, or assistant shall consult with or receive oral or written comment, advice, data, or recommendations respecting any such case from other officers or employees of the agency or from third parties.

## FINDINGS AND OPINIONS

(d) All final decisions and determinations shall be stated in writing and accompanied by a statement of reason, findings, and conclusions upon all relevant issues of law, fact, or discretion raised by the parties: *Provided, however,* That the findings and conclusions in every case shall encompass all relevant facts of record and shall themselves be relevant to, and shall adequately support, the decision and order or award entered.

## EFFECTIVE DATE

SEC. 10. This Act shall take effect ninety days after its approval: *Provided, however,* That no procedural requirement shall be mandatory as to any administrative proceeding formally initiated or completed prior to such date.

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